SUPREME COURT, U. S.

No. 1014

FILED

JAN 30 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

JAMES DEAN WALKER,
Appellant,

v.

STATE OF ARKANSAS,
Appellee.

On Appeal from the Supreme Court of Arkansas.

JURISDICTIONAL STATEMENT.

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No. .....

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JAMES DEAN WALKER,
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v.

STATE OF ARKANSAS,
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On Appeal from the Supreme Court of Arkansas.

JURISDICTIONAL STATEMENT.

Appellant appeals from the final order of the Supreme Court of Arkansas, entered on the 12th day of December, 1966, affirming the judgment of his conviction for the crime of murder in the first degree, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the Supreme Court of Arkansas is reported in 241 Ark. 300, 408 S. W. 2d 905. The order denying rehearing is reported in 241 Ark. 663, 408 S. W. 2d 905, 917. Same are attached hereto as Appendix "C".

JURISDICTION.

The opinion of the Supreme Court of Arkansas was rendered on October 31, 1966, and the final order of the Supreme Court of Arkansas denying rehearing was entered on December 16, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: **Largent v. Texas**, 318 U. S. 418, and **Dahnke-Walker Milling Co. v. Bondurant**, 257 U. S. 282.

In the event this Court should determine that an appeal is improvidently taken and that the proper mode of review is by petition for certiorari, appellant respectfully requests that his jurisdictional statement be taken and regarded and acted upon as a petition for writ of certiorari under the provisions of Title 28, U. S. Code, Sec. 2103, under the purview of **Raley v. Ohio**, 79 S. Ct. 1257, 360 U. S. 423.

STATUTE INVOLVED.

Ark. Stat. Ann., § 43-2010. Production of documents.—The court, on motion of either party, may, by its order and process, compel the production of any written document, or any other thing which may be necessary or proper to be produced or exhibited as evidence on trial, and may punish a disobedience of its orders or process as in case of witnesses refusing to testify. [Crim. Code, Sec. 153; C. & M. Dig., Sec. 3111; Pope's Dig., Sec. 3945.]

QUESTIONS PRESENTED.

(1) Whether the Supreme Court of Arkansas erred in applying and upholding the validity of Ark. Stat. Ann., Sec. 43-2010 (1964 Repl.), against the attack that it was repugnant to the Constitution of the United States in requiring the appellant and his attorney to produce and file as a part of the record in this case documents (ballistics reports) from their defense files as a discovery aid to assist the prosecution in preparing its case, said statute and its application to the present case being in violation of the constitutional prohibition against compulsory self-incrimination.

(2) Whether the prejudices and misconduct of the trial judge were such as to deny James Dean Walker a fair and impartial trial and deny him due process of law, all in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

(3) Whether the trial judge's repeated comments to the jury as to James Dean Walker's having been previously convicted of murder in the first degree and the conviction reversed, destroyed the impartiality of the jury and violated his right to a fair and impartial trial and denied him due process of law at his second trial, all in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

(4) Whether the trial court's failure to grant the appellant a change of venue, by reason of widespread prejudicial pretrial publicity and a newspaper editorial urging the death penalty for the appellant, was so blatant as to deprive the appellant of a fair and impartial trial and deny him due process, in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, as noted in **Sheppard v. Maxwell,**

86 S. Ct. 1507 (1966), and **Irvin v. Dowd**, 81 S. Ct. 1639 (1961).

(5) Whether the use of incompetent evidence to obtain a conviction (specifically, the reading into evidence of an unidentified, unauthenticated document, purporting to contain alleged testimony of certain witnesses at a former trial), denied the appellant due process of law, the right to be confronted with his accusers, and denied him a fair and impartial trial in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

(6) Whether the concealment and suppression of evidence by the prosecution and agencies of government, and use of known false and deceptive testimony, to obtain a conviction constitutes a denial of due process and deprived James Dean Walker of a fair and impartial trial in violation of his rights under the Fifth, Sixth and Fourteenth Amendments.

STATEMENT.

The appellant was tried and convicted of the crime of first degree murder for allegedly shooting a policeman. The accused has been formerly tried and convicted of this offense and given a death sentence. The first conviction was reversed by the Supreme Court of Arkansas (Walker v. State, 239 Ark. 172, 388 S. W. 2d 13), and a new trial granted. This appeal comes from the ensuing errors committed during the course of the second trial.

The facts giving rise to the charge are essentially as follows: On the night of April 15, 1963, the slain policeman and a companion police officer, Barrentine, stopped an automobile on the outskirts of North Little Rock, Arkansas, in which the accused was a passenger. In addition to the driver, the automobile had a third occupant, a Miss Ford. As Officer Barrentine searched the driver, the slain officer walked around to the passenger side of the vehicle and gun fire immediately broke out. Officer Barrentine drew his gun and started firing towards the vehicle. After the firing subsided the slain officer was found beside the car shot only one time and in the heart with a .38 weapon. The autopsy report showed his death to be instantaneous. The slain officer's empty gun was found behide his body with all six rounds expended. This fact was suppressed from evidence at the first trial, and the officer's gun and the empty shell hulls, and any testimony as to his ever firing any shots was withheld from evidence. The accused was found lying unconscious beside him seriously wounded, shot five times in the right side of his body. The accused was found holding a fully-loaded snubnose S & W .38 pistol in his right hand, a bullet had severely injured his right arm in which he held the unfired gun. Other police officers who later came to the scene claimed to have found a second gun (a .38 S & W Police Special) lying under or near the uncon-

scious appellant, which gun was empty and all rounds had been expended. The prosecution attempted to prove by circumstantial evidence that the empty Police Special revolver belonged to the appellant, and the prosecution attempted to prove by ballistic evidence that it was the murder weapon. The proof was conflicting as to whether the State performed any routine fingerprint tests on the alleged murder weapon, or paraffin test on the accused (T. 707, 817). In any event, the defense was unable to procure their production.

At the first trial, Officer Barrentine testified in essence that he had inflicted the five near-fatal bullet wounds upon the appellant, after the appellant had shot and killed his partner. He completely omitted from his testimony any mention that the slain officer's gun was recovered empty, with all rounds expended (T. 673-674; 686-687). At the time of the giving of this testimony the prosecution had in its files the official ballistics reports on the bullets removed from the appellant's body, which revealed that the wounds to appellant were inflicted by the deceased officer prior to his death (T. 792-793). This ballistics report was suppressed from evidence by the prosecution, as were certain material photographs. Police officials had in their files photographs of the automobile, which revealed that the shot fired by Officer Barrentine struck the rear of the vehicle and not the appellant, as claimed. All these photographs were suppressed.

ARGUMENT.

I.

At the second trial the defense sought to prove that the slain officer was accidentally killed by a stray bullet fired from Officer Barrentine's gun; and that the accused, who was found unconscious with a fully-loaded gun in his right hand, had never fired a shot. Prior to the commencement of the second trial, present counsel for the appellant—who did not represent him at the first trial—sought to obtain a private ballistics test on Officer Barrentine's gun, together with all weapons involved or found at the scene (T. 7-9). When Officer Barrentine's gun was finally obtained for examination, it was discovered that two inches or more had been sawed off his gun barrel, thereby rendering a potential defense ballistic test impossible on this weapon (T. 48).

The defense procured a private ballistics test on the alleged murder weapon, as well as all guns involved at the scene, by a nationally known Minneapolis firearms expert. Upon completion of his examination, the defense ballistics expert mailed a confidential written report addressed to counsel for defendant answering certain questions therein which defense counsel had propounded to him relative to his examination (T. 48). Prior to receipt of the report the trial judge entered an order, over defense objections, ordering "the defendant, by his attorney * * * to deliver to and file with the Clerk of this Court as a part of the record and proceedings herein the written ballistic report of said firearms examiner, and to furnish a copy thereof to Honorable John Jernigan, Prosecuting Attorney" (Appendix B; T. 24, 25). The order further recited "the defendant's objections to said order are hereby noted and his exceptions saved."

The findings of the ballistic expert were inconclusive, but contained matters incriminating to the appellant, i. e., it was found that the class characteristics between the alleged murder weapon and the fatal bullet were identical (T. 48). On his appeal to the Arkansas Supreme Court appellant contended that this order requiring the defense counsel to turn over the defense report from his files "violated defendant's rights against self-incrimination under the United States Constitution, Fifth Amendment". This contention was raised at pages 125-131 of Appellant's Brief before the Arkansas Supreme Court. Ark. Stat. Ann. 43-2010 was first drawn in question by the Attorney General of Arkansas in Appellee's Brief (pp. 17-29), who argued that the production of the defense report from defense counsel was authorized and permissible under Ark. Stat. Ann., Sec. 43-2010 (Repl. 1964). In Appellant's Reply Brief (pp. 10-15), appellant argued that any construction of this statute to apply to defendants or their counsel in criminal cases would make the statute repugnant to the Constitution of the United States. At page 11 of his reply brief appellant argued, "It was obviously not the purpose of this statutory provision to permit the seizing of documents, privileged and confidential in nature, nor to require an accused to deliver over evidence that might tend to incriminate him. Otherwise, the statute would be contrary to the constitutional safeguards." The Arkansas Supreme Court in its opinion (Appendix C), 241 Ark. 300, 408 S. W. 2d 905, construed Ark. Stat. Ann., Sec. 43-2010 (Repl. 1964), to apply to defendants and their counsel as a discovery aid to assist the prosecution in preparing its case, and upheld the validity of the statute against the attack that such application was repugnant to the Constitution of the United States. In so doing the State Supreme Court used the following language:

> "Appellant here attempts to argue that after being permitted by order of the court to have a private

examination of the guns, bullets and shells by a firearms expert of his own choice, he was entitled to suppress the report received as to the results of such tests so that same could not be made a part of the record for the information of the State. The court ordered the ballistics report filed as a part of the proceedings, but not as evidence. This was proper in every respect as the report was clearly admissible in evidence if introduced by the maker thereof.

"Ark. Stat. Ann., Sec. 43-2010 (Repl. 1964), constitutes a part of our criminal procedures and it provides:

> 'The court, on motion of either party, may, by its order and process, compel the production of any written document, or any other thing which may be necessary or proper to be produced or exhibited as evidence on trial, and may punish a disobedience of its orders or process as in the case of witness refusing to testify.'

"We therefore find no merit in appellant's contention under Point No. 2."

In his Petition for Rehearing before the Supreme Court of Arkansas, appellant argued that:

> "Rehearing should be granted because the Court failed to consider, or overlooked, the question of whether the federal constitutional rights of this accused were violated by the unprecedented confiscation and impounding of the defense ballistics report, and in ordering defense counsel to deliver privileged documents from his files to the prosecuting attorney, and requiring them to be filed as a part of the proceedings. * * * The Court mistakenly and erroneously relied upon Ark. Stat. 43-2010 * * * that the application and construction of said statute as construed and applied by this Court requiring the defendants and

their attorneys to produce documents from their files is in violation of the prohibition contained in the Fifth Amendment to the United States Constitution as to compulsory self-incrimination."

This point was further argued in Appellant's Brief on Rehearing, pp. 10-14.

II.

Appellant claimed that the prejudice and misconduct of the trial judge denied him a fair and impartial trial and denied him due process of law. The appellant prior to the commencement of the trial moved to disqualify the trial judge (T. 80-81) for bias and prejudice and introduced unrebutted proof by three witnesses (T. 81-86; 87-89; 90-92) that the trial judge had made statements in advance of the trial that he was going "to burn the accused if I can." The trial judge, who didn't deny making these statements, admitted "I couldn't say I didn't say it" (T. 86). During the course of the proceedings the trial judge at least twice commented to the jury that the appellant had been previously convicted of this offense and found guilty of first degree murder for killing the policeman, but that he had been granted a new trial (T. 148, 334).

The record is filled with statements by the trial judge belittling defense counsel, suggesting that they were "asking ridiculous questions" (T. 417, 842), "making ridiculous objections" (T. 636), "costing the state unnecessary money" (T. 829, 542, 851), suggesting that the defense had tampered with the ballistic evidence (T. 777-778), expressing surprise and ridicule to the jury at defense counsel's offer to waive the oath when calling the prosecuting attorney as a witness (T. 843). The judge's hostility towards the appellant as an accused "cop-killer" affected his demeanor and permeated the courtroom atmosphere. The record shows that at one point defense

counsel even made a complaint to the judge in chambers as to the tone of his voice and demeanor in the presence of the jury:

> "Also, if the court please, I wish to complain about the tone of the court's voice when he addresses counsel before the jury."

To which the judge replied:

> "I can't control that, I'm sorry" (T. 294).

In appellant's brief before the Arkansas Supreme Court (pp. 143-162) are found 20 pages of excerpts of such prejudicial statements and comments by the trial judge, illustrative of his misconduct and prejudicial deportment. The action of the trial judge in fixing a $250,000.00 bail bond for the appellant (T. 45), who had been adjudged a pauper, pending his appeal to the State Supreme Court, further illustrated the feeling of hostility manifested by the trial judge.

Appellant's brief before the State Supreme Court, pages 138-193, deals with the prejudicial behavior and deportment of the trial judge; the federal question is invoked under appellant's assignment of error No. 5 before the State Supreme Court (Appellant's Brief, 183-193) entitled "The court erred in commenting to the jury as to the results of the defendant's former trial; such action violated the constitutional guaranty of a fair and impartial trial and constituted a denial of due process."

In his reply brief the appellant again raised the constitutional issue (p. 18): "Under the purview of the cases hereinbefore cited in appellant's brief, it is respectfully submitted that such comments destroyed the impartiality of the jury and constitutes a denial of a fair and impartial trial as guaranteed by the Sixth Amendment to the United States Constitution and a denial of due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States."

The State Supreme Court disposed of this issue in its opinion by concluding (241 Ark. 300):

> "We have examined the record in this case as to all comments of the trial court made in the presence of the jury and we find no prejudicial error in any of said comments."

In his petition for rehearing appellant assigned as second ground for rehearing (pp. 2-3):

> "The prejudice and misconduct of the trial judge denied the appellant due process of law and deprived appellant of a fair and impartial trial in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States."

In his Notice of Appeal to the United States Supreme Court appellant assigned as Question No. 2 presented on appeal the prejudice and misconduct of the trial judge, denying him a fair and impartial trial, and denying due process of law.

III.

At least twice during the impaneling of the jury the trial judge commented to the jurors as to the results of the defendant's former trial (T. 148, 334). Appellant contends that the trial judge's comments to the jury as to his having been previously convicted of this offense and found guilty of first degree murder for the slaying of the policeman destroyed the impartiality of the jury and violated his right to a fair and impartial trial, and denied him due process of law, all in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. This argument was presented to the State Supreme Court in Appellant's Brief (pp. 183-193) and the Attorney General of Arkansas answered this argument in Appellee's Brief (pp. 37-39) as follows:

"What Judge Kirby told the jurors was a fact; Walker had been tried and convicted before. This was a matter of public record and in so stating these facts the lower court in no way commented on them. • • • Surely it would be better for the jurors to know the disposition of the case which they are to hear. We contend that by informing the jurors of Walker's former trial and conviction the lower court thereby thwarted any possible confusion on the part of the jurors as to the disposition of the case before them. • • • We respectfully contend that in explaining Walker's prior trial and conviction to the jury that the lower court in no way violated any of the defendant's constitutional rights. • • •"

In his Reply Brief the appellant reasserted his constitutional claim (pp. 17-18). The Arkansas Supreme Court determined this issue in 241 Ark. 300, by concluding that "the implications of these remarks, if any, could be construed as favorable to the accused." In his Petition for Rehearing (p. 3) the appellant again reasserted this contention and in his Brief on Rehearing (pp. 19-21) appellant argued:

"The repeated reminder of previous conviction • • • destroyed any vague hope of a 'presumption of innocence' or an 'impartial jury'. • • • these comments • • • were calculated to impress upon the jury (the eventual fact) that their chore was expected to be but a mere formality. This destroyed the impartiality of the jury and denied this defendant due process of law by a fair hearing in a fair tribunal, in violation of the Sixth Amendment to the United States Constitution. Lane v. Warden, Maryland Penitentiary, 320 F. 2d 179."

In his Notice of Appeal this issue was assigned as the third question presented by this appeal.

IV.

Prior to the commencement of his second trial, from which this appeal comes, the appellant filed a petition for change of venue (T. 13-21). This petition alleged that gross prejudice existed in the county against the defendant and that such had been magnified and agitated by a barrage of newspaper headlines, articles, pictures and editorials unleashed against the defendant. The petition made specific reference to sixteen, mostly front page, banner-headline news articles, which publications (T. Vol. 4) carried sensational front page stories giving the police and prosecution's version of the case, dramatizing the prosecution's facts and alluding to the appellant's unsavory character, depicting him as a "cop-killer" and gangster. From the date of the alleged commission of the offense, throughout appellant's first and second trials, a constant barrage of inflammatory newspaper articles were published, depicting the appellant as a violent and dangerous killer, by reason of which the case became perhaps the most sensational murder trial in the modern history of the State of Arkansas. Before the commencement of the appellant's second trial, the largest newspaper in the State, the **Arkansas Gazette**, even ran an editorial advancing and advocating its editorial views that nothing less than the death penalty should be given the appellant. A newspaper editorial campaign was launched to exact the death penalty and eradicate the accused. This editorial, which is attached hereto as Appendix A, catalogued the appellant with the class of felons called "cop-killers and mutilators of little children included."

In his Petition for Change of Venue the appellant alleged:

> "That by reason of the publication of said editorial advocating the death penalty for this defendant • • • and dozens of other subsequent articles published • • •

that to bring this defendant to trial in Pulaski County, Arkansas, where the minds of the inhabitants thereof have been so prejudiced and inflamed against him would violate his constitutional guarantee to a fair and impartial trial; that it would be in violation of the due process requirements of the Fifth, Sixth, and Fourteenth Amendments to the Federal Constitution * * *."

Appellant's Petition for Change of Venue was supported by aproximately 200 affidavits of business and professional persons in the county, including affidavits for 18 prominent ministers (T. Vols. 4 and 5). Each of the affiants stated that they were familiar with the adverse newspaper articles and the editorial, and that the minds of the inhabitants were so incensed that the appellant could not receive a fair and impartial trial. The trial court denied the motion for a change of venue. In his brief before the State Supreme Court appellant argued (pp. 233-248) that the trial court's failure to grant him a change of venue denied him due process of law, and deprived him of a fair and impartial trial. The Arkansas Supreme Court ruled that the appellant was not entitled to a change of venue. In his Petition for Rehearing the appellant again reiterated his constitutional claim, relying principally on **Sheppard v. Maxwell**, 86 S. C. 1507 and **Irvin v. Dowd**, 366 U. S. 717, 81 S. C. 1639. In his Notice of Appeal this issue has been assigned as one of the questions to be presented on appeal.

V.

The State's two principal witnesses against the appellant, Miss Ford and Miss Roberts, did not appear for the second trial, and the prosecution claimed it was unable to find them for service of subpoena (Tr. 540-556). The defense made an offer of proof that the witnesses were in

the jurisdiction, and sought a 30-minute recess for the purpose of calling four rebuttal witnesses, who were already under service of subpoena to show that the witnesses were present in the jurisdiction and amenable to service (T. 556-558). The trial judge denied defendant's request for a 30-minute recess for the purpose of bringing the rebuttal witnesses in to give their testimony. At this point the prosecuting attorney, over defense objections, was allowed to read to the jury a certain document (T. 577-619) which document had never been introduced into evidence, identified, or in any manner authenticated. The document ostensibly contained (but was never shown to be) statements or testimony of the two absent witnesses given previously. The defense objected to the reading of the unidentified, unauthenticated document to the jury on the ground (1) that there is no showing that this testimony related to the accused who is on trial in this case (T. 636, 637, 639, 640, 642, 643); (2) for reason that there was no opportunity to cross-examine the witness (T. 621-622); (3) that no proper foundation was laid (T. 621); for the reason that there is no showing that the statements or testimony related to this accused (T. 628); for the reason that the Walker mentioned by the witnesses in their statement had not been identified as the accused in this case (T. 631). These objections were overruled by the trial judge, who made the following observation:

> "Overruled. Save his exceptions. Do you have any more? This is getting a bit ridiculous. I guess I can overrule them as long as you can make them" (T. 636).

On appeal before the State Supreme Court this point was argued at length (pp. 193-218). The opinion of the State Supreme Court (pp. 12-14) ignored this issue. In appellant's Petition for Rehearing this was assigned as one of the grounds for rehearing (pp. 3-4). It was there urged by the appellant:

"The court overlooked, or failed to consider, or make the slightest mention of Point VI-C of Appellant's Brief (pp. 209-216) * * * The improper admission of said evidence to the jury violated the rights of the appellant under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States."

In his Brief on Rehearing (pp. 21-24) he reasserted the constitutional issue before the State Supreme Court, arguing; "that the introduction of said unauthenticated purported transcript deprived the appellant of due process of law and of a fair and impartial trial * * *."

In his Notice of Appeal the appellant assigns this issue as one of the questions raised by this appeal.

VI.

The final question presented is whether the concealment and suppression of evidence by the prosecution and agencies of government, and the use of known false and deceptive testimony to obtain a conviction, constituted a denial of due process and deprived the appellant of a fair and impartial trial. The record shows that the prosecution from the outset, throughout the first and second trials, followed a pattern of conduct of using known false and deceptive testimony against the appellant, and of suppressing and withholding from evidence various proof in its possession (State Police ballistic reports, decedent's gun, empty shell hulls from decedent's gun, photographs) which exhibits and documents were all favorable to the accused, and which established the falsification of the testimony being offered by the State's witnesses.

More specifically, the record in this case shows that the prosecution and the law enforcement agencies, in their zeal to avenge the death of a fellow police officer, perpe-

trated the following acts of misconduct in their prosecution of the accused:

(1) Interfering with a defense ballistic examination (on Officer Barrentine's gun) in materially altering the evidence weapon by sawing the gun barrel off, and thereby rendering a ballistic test impossible (T. 48).

(2) Through use of threats and menacement of jailing, rendering a material witness unavailable for accused's second trial, which witness would give testimony favorable to the accused and establish that the deceased officer apparently panicked and fired first upon the accused, inflicting the five wounds into the accused's right side, and that the accused, who was found unconscious holding the fully loaded snubnose revolver, never fired a shot. (See exhibit to Appellant's Petition for Rehearing; and pp. 29-39, Petition for Rehearing.)

(3) The deliberate suppression of information contained in the State Police ballistic report on the bullets removed from the appellant's body, which showed that the wounds to the accused were inflicted by the deceased officer prior to his death and not by Officer Barrentine as contended (T. 792-793).

(4) Permitting Officer Barrentine to give known false and deceptive testimony to the effect that he shot the accused five times and inflicted the near-fatal wounds upon the accused, after the accused had shot and instantly killed his partner, Officer Vaughn.

(5) Deliberately withholding from evidence photographs of the vehicle in which the appellant was riding, which photographs reflected that Officer Barrentine's shots struck the rear trunklid of the vehicle, and not the accused as he testified (T. 66-67, 805-809).

(6) Causing or permitting Officer Barrentine to withhold or suppress from his testimony (a) any mention of

the deceased officer ever firing a shot, much less those inflicting the wounds upon the accused (T. 673-674); (b) Any mention of the fact that he (Officer Barrentine) recovered the deceased officer's gun at the scene and it was empty, all rounds having been expended (T. 674-675); (c) Any mention of the fact that he had inspected the vehicle the following day and knew that his shots lodged in the rear trunk lid of the vehicle and did not strike the asccused as testified to and implied (T. 678); (d) Omitting any mention of the fact that he knew the results of the State Police ballistic report on the bullets removed from the accused's body and therefore well knew his testimony to be false, deceptive, and untrue (T. 686-687).

(7) The prosecution deliberately withheld from evidence the gun of the deceased officer, or any testimony to the effect that it was empty when recovered at the scene and thereby continued to infer and impress to the jury the false conclusion that the deceased officer, who was shot one time through the heart was instantly killed, as soon as he walked up to the vehicle and before he could unholster his gun (T. 683-687).

(8) Similarly, and for the same purpose, the prosecution withheld from evidence the six expended rounds removed from the deceased officer's gun.

(9) The Chief of Police admitted that paraffin tests were performed (T. 707) and the former opinion in this case by the Arkansas Supreme Court (388 S. W. 2d 13, 239 Ark. 172) likewise reflects that paraffiin tests were performed; yet such reports were suppressed and withheld from evidence, even over defense motion to require their production. The appellant, who was found unconscious holding the fully loaded, unfired snubnose, claimed he never fired a shot at the scene (as does the subsequent statement of the State's principal witness (pp. 29-39, Petition for Rehearing).) The production of this paraffin

test was vital, as was the results of the routine fingerprint test on the alleged murder weapon (a .38 S & W Police Special allegedly found under or near the unconscious appellant, which the State attempted to prove by circumstantial evidence belonged to the accused).

(10) The Police Identification Officer admitted that routine fingerprint tests on the alleged murder weapon had been performed (T. 817). The defense moved to require the production of such fingerprint tests but the prosecution contended that no such tests were even made on the alleged murder weapon (yet the police finger kit is clearly visible (T. 820) on State's Exhibit No. 7).

(11) Officer Barrentine admitted (T. 671-672) that a ballistic examination was performed on his gun, yet the State denied the existence of such report, and failed to produce it upon defense motion.

In the Appellant's Brief before the State Supreme Court (Appellant's Brief, pp. 78-114), the accused vigorously argued that the aforesaid conduct of the prosecution, in the suppression and withholding of evidence favorable to him "constituted a denial of due process in violation of the Fourteenth Amendment to the United States Constitution" (Appellant's Brief, p. 112). Appellant there relied principally upon the following authorities to support his contention before the Supreme Court of Arkansas:

Pyle v. Kansas, 317 U. S. 213, 63 S. C. 117;
Mooney v. Holohan, 294 U. S. 103, 55 S. C. 340;
U. S. ex rel. Almeida v. Baldi, 195 F. 2d 815.

In his Reply Brief the appellant pursued the point further (pp. 1-9). The Opinion of the Arkansas Supreme Court disposed of this issue simply by concluding (page 6 of the Opinion), that "the record simply does not support the contention by appellant that the State suppressed any evidence."

In his Petition for Rehearing the appellant again reasserted this contention (pp. 4-5), and in his Brief on Rehearing the point was vigorously pursued (pp. 29-39). He there argued:

> "The court has closed its eyes to any conduct on the part of the police department or prosecution, regardless of how brazen, flagrant, or shocking it may be, and the opinion was strangely silent, omitting any facts in the written opinion unfavorable to the State, or which would tend to place them in an uncomplimentary light. * * * The proof was undisputed that the State was caught deliberately doctoring its testimony. Barrentine admitted falsely and deliberately claiming to have shot the accused * * * he sawed two inches off his gun barrel to prevent a defense ballistic examination. It is undisputed and undenied that the State had concealed and withheld ballistic reports and photographs, and possibly fingerprint and paraffin test reports, which were favorable to the accused, all of which contradicted and refuted the State's fabricated version. * * * This statement by the witness, Mary Louise Roberts, described a course of conduct by the prosecution * * * of the same caliber as pursued all the way through. From the beginning this has been a case of missing gun barrels, missing witnesses, missing ballistics reports, missing photographs, missing fingerprint, and paraffin tests, missing shell hulls, and amnesia-stricken witnesses * * * A departure by the courts from the imperative rules and principles established in our Constitution * * * to meet the exigencies of a particular case, or to satisfy the wild clamor for innocent blood to avenge even a police officer's death, is an evil not to be thought of, let alone acted upon."

In Appellant's Notice of Appeal the final question raised is whether the suppression of this evidence de-

prived the appellant of a fair and impartial trial and denied him due process of law in violation of his rights under the Fifth, Sixth and Fourteenth Amendments.

The Questions Are Substantial.

I.

Ark. Stat. Sec. 43-2010, as applied by the Supreme Court of Arkansas, authorizes and enables the prosecution in criminal cases, as a pretrial discovery aid, to explore defense files and to compel defense counsel to produce confidential and privileged documents and reports contained in the defense files, incriminating in nature.

On November 15, 1965, two weeks before appellant's trial commenced, the trial judge entered an order on the prosecution's motion (said order is attached hereto as "Appendix B") directing and requiring "the defendant, by his attorney * * * to deliver to and file with the clerk of this court" the defense's private report to be made and filed as "a part of the record and proceedings" in the case, and "to furnish a copy thereof to Honorable John Jernigan, Prosecuting Attorney."

The private ballistics report which the trial court ordered defense counsel to produce and surrender to the prosecution comprised a part of the defense's file. This report (T. 48) was a confidential letter or communication to defense counsel from the defense's private ballistics expert answering certain questions which defense counsel had propounded to the defense expert. While the report and findings of the expert (T. 48) were inconclusive to a degree, certain portions of it were incriminating to the defendant, in that the report did establish that the class characteristics between the alleged murder weapon and the alleged fatal bullet were the same. The report also had other incriminating features to it. The pretrial discovery court order entered against this defendant (Ap-

pendix B) permitted the prosecution by legal process to ascertain the particulars of the accused's defense to be offered and forced him to surrender into the hands of the prosecution incriminating and privileged documents.

The Arkansas Supreme Court held in its opinion dated October 31, 1966 (attached hereto as Appendix C), that the order of production against the defendant, and defense counsel, was authorized under Ark. Stat. 43-2010. Appellant contends that this order (Appendix B) violated his rights as to compulsory self-incrimination, and required him to surrender privileged and confidential documents.

The scope of this statute in its broad application by the State Supreme Court to include and apply to "party defendants and their counsel" violates the federal constitutional safeguards. This statute makes no exception or exemption for documents or matters incriminating in nature; in fact the Arkansas Supreme Court recognizes none, on the theory that a defendant should not be entitled to "suppress" incriminating information in his possession.

The right of a person not to be compelled in a criminal case to be a witness against himself is a fundamental right under the Fifth Amendment affecting the "very essence of constitutional liberty and security."

"The seizure of a man's private books and papers to be used in evidence against him is not substantially different from compelling him to be a witness against himself." **Boyd v. U. S.**, 116 U. S. 616; 6 S. Ct. 524, 29 L. Ed. 746.

The question raised in this case is substantial and of paramount importance to criminal jurisprudence and procedure within the Arkansas courts. Under this application of the statute the prosecution is vested with the unfettered right to pilfer and plunder defense files to ferret out

information incriminating in nature with which to bolster the prosecution's case. It is an instrument of capitalizing on the "work product" of the defense lawyer, and of ascertaining the particulars of the defense to be offered.

The American system of criminal prosecution is accusatorial, and not inquisitional. Those accused of a crime are not required to cooperate with the prosecution. An accused has the absolute right to remain silent or mute. unless he chooses to speak in the unfettered exercise of his own will. The self-incrimination clause of the Fifth. Amendment was made applicable to the states by the Fourteenth Amendment. **Malloy v. Hogan**, 84 S. Ct. 1489, 378 U. S. 1; **Griffin v. State of Calif.**, 85 S. Ct. 1229, 380 U. S. 609.

Under this statute as applied by the Supreme Court of Arkansas the prosecution is vested with the pretrial discovery right of inspecting the "work product" of the defense counsel, and ascertaining the nature and particulars of the defense to be offered. The application of this statute to apply to party defendants and their counsel goes beyond authorizing mere pretrial discovery in criminal cases; the prosecution is even allowed, under color of statute, to procure, seize and confiscate by court order the incriminating portions of the defendant's files, and to require their production "and filing with the clerk of the court as a part of the record and proceedings in the case."

This court has held that the constitutional privilege against self-incrimination is a personal one—applying to natural individuals. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal document or evidence that might incriminate him. The prosecutors are forced to search for independent evidence in-

stead of relying upon proof extracted from individuals by force. The privilege is firmly embedded in our constitutional and legal frameworks as a bulwark against inquisitious methods of prosecution. "It protects the individual from any disclosure in the form of oral testimony, documents or chattels, sought by legal processes against him by a witness." **U. S. v. White**, 322 U. S. 694, 64 S. Ct. 1248.

The Arkansas Supreme Court, here under guise and color of the statute, actually approved the practice of compulsory self-incrimination, saying that a defendant could not "suppress" evidence unfavorable to him, but could be compelled to deliver and surrender incriminating matter contained in the defense files to the prosecution "to become a part of the record and proceedings" in the case against him. Under this decision and the statute as applied, the accused's basic right to stand mute and silent is further impinged, his own defense files can be used against him. The order of the trial court (Appendix B) made the incriminating matter "a part of the record and proceedings" even before the trial got under way, and in effect required the defendant to put on proof when he had the right to remain silent.

II.

The second question raised by the appellant in this appeal, that the prejudice and misconduct of the trial judge denied him a fair and impartial trial and due process of law, is substantial and meritorious. The trial judge, by denying appellant's motion to disqualify himself on the grounds of bias and prejudice, denied the accused a fair trial in a fair tribunal.

Three witnesses testified in support of appellant's motion for disqualification that the trial judge had made statements, in advance of the trial, threatening "to burn

the s. o. b. if I can" (referring to the accused) (T. 81-92). The trial judge, while admitting that he might have made such statements, further confessed that "if it was up to him" to burn the accused, "we wouldn't have to have this trial" (T. 85-86).

Due process requires that a tribuanl be impartial. **Berger v. U. S.**, 255 U. S. 22, 35, 41 S. Ct. 230, 234. **In re Murchison**, 75 S. Ct. 623, 349 U. S. 133.

"Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the bars nice, clear and true between the State and the accused denies the latter due process of law." **Tumey v. State of Ohio**, 273 U. S. 510, 532, 47 S. Ct. 437, 444.

"Impartiality is not a technical conception." "A fair trial in a fair tribunal is a basic requirement of due process." **Irvin v. Dowd**, 81 S. Ct. 1639, 366 U. S. 717 (1961).

A failure to accord an accused a fair hearing in an impartial tribunal violates even the minimal standards of due process.

The trial judge's extreme hostility and animosity towards the accused and his counsel manifested itself throughout the trial. His verbal abuse of defense counsel, both within and without the presence of the jury, and his prejudicial comments and statements were so extensively and frequently made that mere excerpts from them consumed twenty printed pages in Appellant's Brief (pp. 139-160) before the State Supreme Court. He admitted that his personal feelings were so embroiled that they affected his demeanor and tone of voice to the point "I can't control it. I'm sorry" (T. 294).

The question here is what are the minimal standards of due process? To what extreme and extent must the bias and prejudices of the trial judge be manifest before an accused can seek shelter in our constitutional safeguards

to escape a biased tribunal? An accused is entitled to an impartial judge, as distinguished from one who has avowed and threatened "to burn the accused if I can".

"Hostility is a form of bias." "* * * but a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial." **Whittaker v. McLean**, 118 F. 2d 596; **Knapp v. Kinsey**, 232 F. 2d 458. See also **U. S. v. Ah Kee Eng**, 241 F. 2d 157, 62 A. L. R. 159.

Fairness, of course, requires an absence of actual bias in the trial of the cases, but our system of law has always endeavored to prevent even the probability of unfairness. * * * Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer. **In re Murchison**, 75 S. Ct. 623, 349 U. S. 133.

This court has long followed the principle announced in **Berger v. U. S.**, 255 U. S. 22, 35, 41 S. Ct. 230, 234: "* * * the tribunals * * * shall not only be impartial * * * but shall give assurance that they are impartial, free * * * from any bias or prejudice that might disturb the normal course of impartial judgment."

Next in importance to the duty of rendering a righteous judgment is that of doing it in such a manner as will beget no suspicion of the fairness or integrity of the judge. Could any accused in this defendant's predicament, who is forced to trial before a tribunal who has "threatened to burn him if he could"; who during the course of the trial displayed to the jury repeated indications of hostility and displeasure of such a nature as to indicate that the judge thought little of the defense counsels' intelligence or integrity; suggesting that the defense had tampered with the ballistics evidence (T. 777-778); or were "asking ridiculous questions" (T. 417-842); making ridiculous objections (T. 636); costing the

State unnecessary money (T. 542, 829, 851); and expressing ridicule to the jury at defense counsel's offer to give the oath when calling the prosecuting attorney as a witness; and hastily denying the accused in a capital case a mere 30-minute recess to produce defense rebuttal witnesses already under subpoena; feel in good faith that he had been accorded a fair trial in a fair tribunal by an impartial judge.

The gross misconduct of the trial judge as reflected by the 20 pages of disparaging comments (See Appellant's Brief, pp. 139-160) directed towards the defense during the course of the trial violated even the minimal standards of due process and denied the appellant a fair trial in a fair and impartial tribunal.

III.

This case presents a novel and important principle of law which this court has apparently not heretofore had occasion to determine, and in which there is an element of grave public interest at stake. Does the trial judge's repeated comments to the jury during their impaneling, informing them that the appellant had previously been convicted of the supreme and capital offense and found guilty of first degree murder by another jury at a former trial for the same offense, destroy the impartiality of the jury and violate the appellant's right to a fair and impartial trial and due process of law?

Appellant contends that the unnecessary informing and imparting of knowledge to the jury that he had been previously tried for this same offense by an earlier jury and found guilty of murder in its highest degree in effect cloaked the accused with the "presumption of guilt" at the outset of his trial. Although this court has apparently not yet had occasion to rule directly on this point, the

principles and basic precepts as to what constitutes a fair and impartial trial has been well established.

A fair trial in a fair tribunal is a basic requirement of due process. Although the Constitution does not demand the use of jury trials in a state's criminal procedure, where a jury trial is provided, it must be a fair trial. **Irvin v. Dowd**, *supra*; **Tumey v. State of Ohio**, *supra*; **Baker v. Hudspeth**, 129 F. 2d 779, 10th Cir. (1942).

It is well established that evidence or allegations of prior crimes are not admissible in a criminal trial. **Michelson v. U. S.**, 335 U. S. 469, 69 S. Ct. 213; **Boyd v. U. S.**, 142 U. S. 450, 12 S. Ct. 292.

The rule is also established that the mere reading of an indictment to the jury (where one is charged under a state habitual criminal act) which indictment contains information as to previous convictions of the defendant destroys the impartiality of the jury and constitutes a denial of a fair and impartial trial. **Lane v. Warden, Maryland Penitentiary**, 320 F. 2d 179 (1963).

"But deeply embedded in the right to a fair and impartial trial is the requirement that the jury of 12 men chosen to sit in judgment shall have no fixed opinion concerning the guilt or innocence of the one on trial, and that their ultimate verdict shall be based upon the facts as they are submitted to them by the court under its instructions and superintendence. Anything less is a farce and a travesty upon justice." **Baker v. Hudspeth**, 129 F. 2d 779, 10th Cir. (1942).

These decisions have strongly condemned any procedure of "creating prejudice in the minds of the tryers of the fact," whether by imparting knowledge to the jury that the accused has a prior criminal record or otherwise. The same reasoning and principles pronounced in **Lane v. Warden, Maryland Penitentiary**, *supra*, and **Baker v.**

Hudspeth, *supra*, would seem to apply here with even greater force. The knowledge unnecessarily imparted to a jury that a man has a prior criminal record is certainly detrimental and, as the Court well observed, could "hardly have failed to influence the jurors"; but obviously even more devastating and influential in the jurors' minds would be the knowledge and reminders imparted from the bench that a previous jury has already found this accused guilty of murder in its highest degree for this same offense for which he is now on trial and "this is the retrial", as the judge told them (T. 148). These comments and reminders from the bench as to the results of the former trial could only convey to the jury the impression that their chore was expected to be but a mere formality. Their minds were thus impregnated with a preconceived notion of guilt and a sense of duty to duplicate the feat of the preceding jury in rendering a conviction for the supreme and capital offense on murder in its highest degree. This extraneous influence eradicably poisoned the minds of the jurors undoubtedly more than the evidence introduced against him.

IV.

The denial of appellant's petition for a change of venue, made due to widespread prejudicial pretrial publicity and a newspaper editorial printed in advance of appellant's second trial urging that he be given the death penalty again on his new trial, deprived the appellant of a fair and impartial trial and denied him due process of law. The newspaper editorial, which was published in the editorial column of the largest newspaper in the state, is attached hereto as "Appendix A." It goes far beyond the practice of mere prejudicial newspaper reporting and coverage of a criminal trial heretofore condemned by this court in **Irvin v. Dowd**, 81 S. Ct. 1639, 366 U. S. 717, and earlier decisions cited therein. The more damaging portion of this lengthy editorial was as follows:

"Death or Eight Years.

James Dean Walker now has a new lawyer and is awaiting a new trial.

The trial was ordered by the State Supreme Court because of a procedural error in its predecessor—in which the jury convicted Walker of first-degree murder in the killing of a North Little Rock policeman and sentenced him to die in the electric chair.

* * * We do think killing a policeman an especially repugnant crime for which especially harsh penalties are in order.

* * * the way the Arkansas remission and probation system now is operating it is impossible to put away any sort of felon—copkillers and mutilators of little children included—with any assurance that confinement will last longer than eight years. * * * One needn't favor taking a life for a life to incline toward the death penalty for especially dangerous criminals * * *."

Here this large news media openly and flagrantly undertook to exert pressure upon potential jurors and poison their minds by this editorial and other articles written (Vol. IV) advocating their editorial views as to why this accused should be given the death penalty. Nineteen similar inflammatory articles were introduced in the record (Vol. IV). This editorial crusade by the newspaper was an unwarranted, flagrant interference by the press even more pronounced than that which this court spoke out against in **Irvin v. Dowd,** *supra*, wherein the court said:

"Not a term passes without this court being importuned to review convictions had in states throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts * * * exerting pressures upon potential jurors before trial * * * This

Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided the poisoner is constitutionally protected in plying his trade."

The question presented by this appeal is whether or not inflammatory newspaper editorials, prejudging the guilt of an accused, and placing him in the class of felons described as "copkillers and mutilators of little children," which try to influence and persuade potential jurors through editorial advocacy to render a verdict exacting the death penalty at appellant's new trial, violates the standards of due process and the definition of a fair and impartial trial as defined by this Court in **Sheppard v. Maxwell**, 86 S. Ct. 1507; **Irvin v. Dowd**, 366 U. S. 717, 81 S. Ct. 1639; **Rideau v. State of Louisiana**, 83 S. Ct. 1417 (1963); **Estes v. State of Texas**, 85 S. Ct. 1628 (1965); **Brown v. Mississippi**, 298 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682; **Chambers v. Florida**, 309 U. S. 227, 241, 60 S. Ct. 472, 479, 84 L. Ed. 716; **Holt v. Commonwealth of Virginia**, 85 S. Ct. 1375 (1965).

The question as to whether or not "editorial advocacy" to persuade and influence prospective jurors to render a given verdict on an impending trial violates due process and constitutes a deprivation of a fair and impartial trial is an important principle of law and has an element of grave public interest at stake.

V.

During the course of the trial the prosecuting attorney took an unidentified, unauthenticated document before the jury (supposedly containing, but never shown to be, a transcript of testimony or statements given by certain absent witnesses at the former trial) and was allowed,

over defense objections, to read to the jury the contents of the unidentified, unauthenticated document. There was no showing (1) that the testimony was given under oath; (2) that this was the testimony of the witnesses given at the former trial; (3) that it had been properly transcribed; (4) that the accused was present when the testimony was given; (5) that the statements therein related to this accused; (6) or that there was any opportunity for cross-examination (T. 621-643).

The unidentified unauthenticated statements or testimony read to the jury were ostensibly made by the State's two principal witnesses, who were absent from the trial. The affidavit attached to appellant's petition for rehearing and abstracted in the petition for rehearing (pp. 29-39) reflects that the absence of these witnesses was procured and instigated by the prosecution. This evidence was vital to the prosecution's case, and without it the State would have had neither a case of first or second degree murder against the appellant.

Appellant contends that this flagrant evidentiary violation of permitting unauthenticated, unidentified documents or statements to be read to the jury without any semblance of foundation, such as showing that they were made under oath, or that the accused was present and had the right to cross-examination, violated the basic right of the accused to be confronted by his accusers before the tribunal which pronounces upon the facts; which right of confrontation is secured by the Sixth Amendment to the Federal Constitution. The use of such unproven documents constituted a denial of a fair and impartial trial and deprived him of due process of law.

In a situation somewhat analogous to this, the U. S. Court of Appeals, 9th Cir., ruled in the case of **Chavez v. Dickson**, 280 F. 2d 727, that the admissions of transcriptions of statements of witnesses which were not ac-

curate representations of recorded conversations, but were grossly inaccurate, would constitute "a denial of that fundamental fairness in the trial proceedings to which the appellants were entitled under the due process clause." Here not only the "accuracy" of the transcriptions are in question, but even their very "identity" was never proven or established. In the **Chavez** case there was at least some proof that the statements were accurate at least to a degree; here there was not.

In the case of Pointer v. State of Texas, 85 S. Ct. 1065, 380 U. S. 400 (1965), this Court held that the Sixth Amendment's right of an accused to be confronted with the witnesses against him is a fundamental right made obligatory on the states by the Fourteenth Amendment. This Court there held that the use at the trial of an accused of the transcript of a witness's testimony given at a preliminary hearing denies him the Sixth Amendment right to be confronted and to cross-examine by counsel the witnesses against him. In this case there is no showing that the statements which became the very heart and core of the prosecution's case against the appellant were even made at a preliminary hearing or before any tribunal, or that they were under oath, or that the accused was present, had the right to cross-examine, of that they were made at any former trial. See also **Douglas v. State of Ala.**, 85 S. Ct. 1074, 380 U. S. 415 (1965). Clearly the reading to the jury of such unproven, unauthenticated, unidentified document without the semblance of any foundation, is even a more flagrant violation of the constitutional safeguards than those mentioned in the **Douglas** and **Pointer** cases. At least in those cases it was established that the testimony had been rendered at some prior judicial proceeding against that particular accused. That was not done in this case.

VI.

Finally, the appellant contends that the concealment and suppression of evidence by the prosecution and agencies of government and the use of known false and deceptive testimony to obtain a conviction denied him due process of law and deprived him of a fair and impartial trial. Appellant has heretofore set forth in his statement at least 11 instances of improper conduct by the prosecution which persisted throughout the course of both his trials. The record is clear that the State deliberately used known false and deceptive testimony and withheld documentary and evidentiary items in their possession which refuted and rebutted oral testimony being given by State witnesses in their over-zealousness to avenge the death of a fellow police officer (T. 66, 67, 678; 683-687; 707; 792-793; 817; 820). There was even the wrongful interference with defense ballistics examination by sawing off the gun barrel from an evidence weapon (T. 48), rendering defense ballistics test impossible, and rendering material witnesses unavailable for the accused's second trial. (See affidavit attached to Appellant's Petition for Rehearing, and Appellant's Petition for Rehearing, pp. 29-39).

This Court has, by a long line of decisions, condemned the practice by the prosecution in the suppression of evidence favorable to the accused. Such constitutes violation of due process, irrespective of the good faith or bad faith of the prosecution. **Brady v. State of Maryland,** 83 S. Ct. 1194, 373 U. S. 83 (1963); **Pyle v. Kansas,** 317 U. S. 213, 215-216, 63 S. Ct. 177, 87 L. Ed. 214; **Mooney v. Holohan,** 294 U. S. 103, 112, 55 S. Ct. 340, 79 L. Ed. 791. See also **U. S. ex rel. Almeida v. Baldi,** 195 F. 2d 815, 33 A. L. R. 2d 1407.

CONCLUSION.

It is respectfully submitted that Ark. Stat. (Anno.), Sec. 43-2010 as applied by the Supreme Court of Arkansas is in conflict with and in violation of the constitutional prohibition against compulsory self-incrimination, and that the rights of the appellant under the Federal Constitution were otherwise impaired in the particulars hereinabove set forth. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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FLETCHER JACKSON,
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Little Rock, Arkansas,
Attorneys for Appellant.

APPENDIX "A".

APPENDIX.

CONCLUSION.

It is respectfully submitted that Ark. Stat. (Annot.) Sec. 43-2010 as applied by the Supreme Court of Arkansas is in conflict with and in violation of the constitutional prohibition against compulsory self-incrimination, and that the rights of the appellant under the Federal Constitution were otherwise impaired in the particulars hereinabove set forth. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

GENE WORSHAM,
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211 Spring Street,
Little Rock, Arkansas,
Attorneys for Appellant.

APPENDIX.

APPENDIX "A".

Arkansas Gazette.

Established November 20, 1819

The Gazette Is the Oldest Newspaper
West of the Mississippi

Published every day by Gazette Publishing Company, Gazette Building, Little Rock. Second Class Mail Privilege authorized at Little Rock, Arkansas. Second Class postage paid at Little Rock, Arkansas.

Page 6A Wednesday, May 12, 1965.

Death or 8 Years.

James Dean Walker now has a new lawyer and is awaiting a new trial.

The trial was ordered by the state Supreme Court because of a procedural error in its predecessor—in which the jury convicted Walker of first-degree murder in the killing of a North Little Rock policeman and sentenced him to die in the electric chair. The North Little Rock Times reports that Walker's defense this time around is being financed by a group of Christian laymen opposed to the death penalty.

The Gazette is inclined to oppose the death penalty, too, but last week wasn't an especially good time to think about tearing out the electric chair.

The day after Walker turned up in court to plead not guilty for the second time, the state Parole Board paroled Walter Baxter of DeWitt. On August 28, 1954, while he was full of booze, Baxter fired a shotgun through the screen door of a rooming house and killed Burt O. Burbank, a DeWitt city marshal who was entering the room-

ing house to investigate the disturbance Baxter was creating there. Baxter was convicted and sentenced to die but he won a new trial on a procedural error and, upon being reconvicted in 1957, was sentenced to life imprisonment. A life term, for Baxter, has proved to be less than eight years. Governor Faubus commuted his sentence and this made parole possible.

We do not hold with punishment for its own sake and we have no notion as to the extent of Mr. Baxter's rehabilitation. We do think killing a policeman an especially repugnant crime for which especially harsh penalties are in order. An attack on an officer of the law is an attack on the law itself, and is therefore an attack on the whole fabric of social order.

The point which seems to us worth making is that the way the Arkansas remission and probation system now is operated it is impossible to put away any sort of a felon —cop killers and mutilators of little children included— with any assurance that confinement will last longer than eight years. No matter how heinous the offense, there is an excellent chance that the governor will reduce the sentence and that the Parole Board the governor appoints will then release the offender.

This is, it seems to us, an almost insuperable barrier to abolition of the death penalty, or even to sensible consideration of abolition of the death penalty. It is, surely, one reason Arkansas juries do not incline to avoid the death penalty. They know that they must choose between putting a criminal out of circulation permanently —by taking his life— and putting him out of circulation for eight years or so, by decreeing a life sentence. One needn't favor taking of a life for a life to incline toward the death penalty for especially dangerous criminals under those ground rules.

APPENDIX "B".

In the
Circuit Court of Pulaski County, Arkansas.

State of Arkansas,
Plaintiff,
v.
James Dean Walker,
Defendant.
No. 62605 (WM)

Order.

On this day comes on for hearing the oral motion of the Prosecuting Attorney to require and direct the defendant to make available for the State's inspection and examination the results of certain ballistics tests performed on the following weapons: Smith & Wesson .38 Special Revolver, Serial No. V14296; Smith & Wesson .38 Special Revolver, Serial No. C90655; Colt .38 Special Revolver, Serial No. 423191; Smith & Wesson .38 Special Revolver, Combat Masterpiece, Serial No. K272115; and Smith & Wesson .38 Special Revolver, Serial No. V341197.

This Court having on the 8th day of September, 1965, upon the motion of the defendant ordered and directed that the aforegoing evidentiary items be submitted for private and independent laboratory examination and testing to an independent laboratory of defendant's designation and selection, and said weapons having been examined pursuant to said order by Stanton O. Berg, firearms examiner of Minneapolis, Minnesota, and the said firearms examiner having submitted a written report dated November 8, 1965, of his findings, the Court finds that said motion should be granted and the defendant, by his attorney, is hereby directed to deliver to and file

with the Clerk of this Court as a part of the record and proceedings herein the written ballistics report of said firearms examiner, and to furnish a copy thereof to Honorable John Jernigan, Prosecuting Attorney.

The defendant's objections to said order are hereby noted and his exceptions saved.

(Illegible),
Circuit Judge.

Approved as to Form:
John T. Jernigan,
Prosecuting Attorney,
(Illegible),
Attorney for Defendant.

Date: 11-15-65.

APPENDIX "C".

James Dean Walker, Appellant,

v.

State of Arkansas, Appellee.

No. 5186.

Supreme Court of Arkansas.

Oct. 31, 1966.

Rehearing Denied Dec. 12, 1966.

Defendant was convicted in the Circuit Court, Pulaski County, William J. Kirby, J., of murder in the first degree, and he appealed. The Supreme Court, Cobb, J., held that requiring defendant who had been permitted by court order to have private examination of guns, bullets and shells by a firearms expert of his own choice to make results of such tests part of record for information of state was not error under statute authorizing court to compel production of any written document where report would be admissible if introduced by maker thereof.

Affirmed.

McFaddin and Bland, JJ., dissented in part from grant of permission to file trial court petition.

Howell, Price & Worsham, Little Rock, for appellant.

Bruce Bennett, Atty. Gen., Jerry W. Faubus, Asst. Atty. Gen., Little Rock, for appellee.

Cobb, Justice.

Appellant prosecutes this appeal from his conviction of the offense of murder in the first degree. The victim was

Jerral Vaughn of the North Little Rock Police Department. This is the second time that appellant has been tried and convicted of the particular crime. In Walker v. State, 239 Ark. 172, 388 S. W. 2d 13 (1965), we reversed his previous conviction and remanded the case for a new trial.

Introductory Facts:

At about 2:30 a. m. on the 16th day of April, 1963, the North Little Rock Police Department was under an alert to stop and investigate a cream colored Oldsmobile. Such a car was first observed by Officer Gene Barrentine, who "tailed" the vehicle as it was proceeding through what is known as Rose City toward England. When Officer Barrentine learned through his radio communications that Officer Vaughn was directly behind him and aware of the situation, he started flashing his red dome light and the cream colored Oldsmobile pulled over and stopped. Officer Barrentine stopped his car directly behind the suspect car. Vaughn stopped his car behind and to the left side of the Barrentine car. The driver of the Oldsmobile, later identified as Freeman Kumpe, got out and came around to the left rear of the Oldsmobile and met Barrentine. While Barrentine was beginning a search of Kumpe, Officer Vaughn went around the right rear of the Oldsmobile, ostensibly to check the other passengers in the car. Almost in the instant that Vaughn disappeared around the right rear of the Oldsmobile, a fusillade of gunfire erupted, the autopsy report subsequently reflecting that Officer Vaughn was killed by a bullet entering his body at the front side of his chest in the heart area.

When Officer Barrentine saw the body of his fellow-officer fall to the ground, he started shooting through the Oldsmobile in the general direction of the right front door. Photographic exhibits introduced in evidence show that

two of such shots were fired into the body of the Oldsmobile at a point slightly below the back windshield. The back windshield was completely shot out and after the shooting appellant was found in a semiconscious condition lying on the ground upon an empty .38 Smith & Wesson revolver. Appellant was hospitalized and survived the shooting, it being found he had been shot five times in the course of the exchange of fire. During the excitement of the gunfire, Kumpe temporarily escaped but was captured in a matter of minutes. Officer Barrentine shot twice at Kumpe but missed.

Linda Ford had been riding in the front seat of the Oldsmobile between Kumpe, the driver, and appellant, who was seated at the right side. During the incident, she jumped from the car and ran back toward the police cars for cover. She testified that appellant had a gun in his hand when he opened the right door of the Oldsmobile to meet Officer Vaughn and that appellant started shooting, being the first to fire. Appellant testified briefly in this case but at no time did he attempt to place a gun in the hands of Linda Ford. Since Kumpe was out of the car and unarmed; Linda Ford had no gun and Officer Vaughn was slain by a bullet fired into his body as he faced appellant, the physical facts leave little, if any, doubt as to the fatal bullet coming from a gun fired by appellant.

Appellant's court-appointed attorney began intensive labors in the case in April of 1965. The case was not reached for trial until late December of that year. Lengthy hearings were conducted by the court on various motions by appellant during the months of preparation for the trial. The first motion of appellant was that he be returned from the State Penitentiary to the Pulaski County Jail for convenience of his counsel in conferring with him and preparing for his trial. The court, on the

same day of the motion, April 5, 1965, entered the requested order. Appellant therefore was permitted to remain in jail instead of the penitentiary for some seven months.

The second motion on behalf of appellant was for a sweeping order requiring the State to submit to appellant's attorneys each and all of its tangible objects which were to be used in evidence, for copying or photographing, and including ballistics tests reports on the guns of Officers Vaughn and Barrentine and upon the .38 caliber Smith & Wesson revolver alleged to have belonged to appellant; fingerprint reports, if any, of appellant; autopsy report of Dr. Leo Davenport; the coroner's report as to Officer Vaughn; paraffin test reports as to appellant, and all photographs of police vehicles at the scene. The motion continued by requesting that the three guns involved in the gunfire be turned over to appellant's attorneys for private and independent examination, the same request being made as to the bullets recovered from the body of appellant and the empty shells of the gun alleged to have belonged to appellant. Following hearing, the court granted appellant all of the relief sought in the motion.

When the defense had completed its private examination of tangible, documentary and photographic evidence relied upon by the State, the prosecution moved that appellant be required to make available the results of the ballistics tests on the three guns involved. The court granted this motion, directing appellant, by his attorneys, to file with the clerk as part of the record of proceedings the ballistics report of Stanton O. Berg, Firearms Examiner of Minneapolis, Minnesota. Appellant objected to this order but nevertheless complied therewith. We note here that the order of the court did not relate to the introduction of the ballistics report in evidence, but solely

to its availability to the prosecution as a part of the record.

Appellant moved for a change of venue, alleging that he could not receive a fair and impartial trial in Pulaski County. The motion involved the testimony and affidavits of some two hundred persons on each side of this contention. A separate volume of transcript is devoted to this motion for change of venue alone. The motion for change of venue was heard and denied, and thereafter appellant filed a motion to disqualify the trial court because of alleged personal prejudice and bias toward the accused. Here again, a lengthy formal hearing was conducted and the motion was denied.

The next motion filed on behalf of appellant was to quash the jury panel. A formal hearing was held, including the taking of testimony of all three jury commissioners, and the motion was denied. We note that no question is raised on this appeal relating to the qualification of any juror selected to try the case.

The case was finally reached for trial in December, 1965. The trial proper took five days. At the outset of the trial all witnesses were individually called to be sworn and the rule was placed upon them. It is significant that Linda Ford and Mary Louise Roberts did not appear to be sworn.

Early in the trial of the case, the court permitted the State, over the objection of appellant, to read into evidence the testimony of Linda Ford and Mary Louise Roberts as given on direct and cross-examination at appellant's first trial. Prior to admitting this evidence, the court required the State to introduce proof of its diligent efforts to locate and serve subpoenas upon the witnesses to compel their attendance and on some three occasions during this proof, the court commented that he much preferred to have the witnesses personally present if possible.

The court found that the witnesses were unavailable through no fault of the prosecution and admitted the testimony under the provisions of Ark. Stat. Ann., § 28-713 (Repl. 1962).

At the conclusion of the first trial, appellant was found guilty and the jury imposed the death penalty upon him. At the end of this trial, appellant was again found guilty of murder in the first degree but the jury spared his life and fixed his sentence at life imprisonment.

The case reaches us on appeal involving a voluminous record, the printed volume of argument on behalf of appellant comprising 263 pages. Appellant requested, and was granted, the privilege of arguing the case orally prior to submission.

On appeal appellant urges twelve points:

1. Suppression of evidence.

2. The order requiring defendant's counsel to file the report of its ballistics expert.

3. Denial of motion to disqualify the trial court.

4. Prejudicial comments of the court during the conduct of the trial.

5. Prejudicial comments of the court to the jury.

6. Permitting the State to read into evidence the transcript of previous testimony of Linda Ford and Mary Louise Roberts.

7. Denying defendant's motion to quash the regular, alternate and special jury panels.

8. Refusal of the court to admit defendant's hospital records into evidence.

9. Denial of defendant's petition for a change of venue.

10. Contentions as to error in instructions given or refused by the court.

11. Refusal of the court to instruct the jury on manslaughter.

12. Refusal of the court to reduce the charge against appellant from first degree murder to second degree murder.

We discuss appellant's points in the order in which they have been enumerated.

Point No. 1—Suppression of evidence.

[1, 2] Appellant complains that evidence was introduced by the State in the second trial which was available but not used and offered in the first trial. Our review is solely limited to what transpired in the second trial. In the second trial, the State handed over to appellant all of its tangible evidence for examination, photographs, etc. The record simply does not support the contention by appellant that the State suppressed any evidence.

We conclude therefore that this contention is without merit.

Point No. 2—The order requiring defendant's counsel to file the report of its ballistics report.

[3] Appellant here attempts to argue that after being permitted by order of the court to have a private examination of the guns, bullets and shells by a firearms expert of his own choice, he was entitled to suppress the report received as to the results of such tests so that same could not be made a part of the record for the information of the State. The court ordered the ballistics report filed as a part of the proceedings, but not as evidence. This was proper in every respect as the report was clearly admissible in evidence if introduced by the maker thereof.

Ark. Stat. Ann., § 43-2010 (Repl. 1964), constitutes a part of our criminal procedures and it provides:

> "The court, on motion of either party, may, by its order and process, compel the production of any written document, or any other thing which may be necessary or proper to be produced or exhibited as evidence on trial, and may punish a disobedience of its orders or process as in case of witnesses refusing to testify."

We therefore find no merit in appellant's contention under Point No. 2.

Point No. 3—Denial of motion to disqualify the trial court.

Appellant has abstracted the testimony of Reverend Ray Branscum, who testified in support of the motion to disqualify the court for bias and prejudice toward the accused, as follows:

> "I am pastor of the Markham Street Baptist Church. Several months ago I was present in Judge Kirby's office and heard him make certain statements in reference to this case. Rev. Guy Wilson, Mr. Bryant and myself came to the judge's office and made a request for permission for the Sheriff's office to bring the defendant out to my church where the ordinance of baptism might be observed. Judge Kirby said he didn't have any confidence in James' profession and that he had killed a man but he was going to grant the request. He told the deputy sheriff that he wanted him heavily guarded and if James made a move, to shoot him down because he didn't want him brought back to him because he intended to burn the s. o. b. anyway."

Reverend Guy S. Wilson testified substantially to the same facts as set forth by Reverend Branscum.

The court took a calculated risk in order to accommodate the ministers and appellant.

At the conclusion of the hearing, the court overruled the motion to disqualify, stating:

> "I think I can give him a fair trial, and I have nothing to do with punishing him, certainly. It is up to the jury to do that. If I don't give him a fair trial, the Supreme Court can reverse me. They have reversed me once before when I thought I was right. I don't think my personal feelings have anything to do with it one way or the other. I did make the statement that if he ran to shoot him. I remember that. I don't remember saying that I was going to burn him, because that's silly; I can't burn him."

[4, 5] The fact that a trial judge may have, or develop during a trial, a personal opinion as to the merits of the case does not make the trial court so biased and prejudiced as to require his disqualification in further proceedings. The mischief occurs when the trial court communicates to the jury by word or deed a personal bias, prejudice or animus toward the accused, causing the accused to be denied a fair and impartial trial. Of course, statements made by a trial court long before a jury panel is selected, and in no way communicated to the trial jury, would not constitute any such bias or prejudice in the conduct of the trial. Since the court actually proceeded to try this case, we review the record in the light of what actually transpired.

The trial court gave counsel for appellant some seven months to prepare for this case. The trial court granted appellant's motion to take him from the State Penitentiary and place him in the Pulaski County Jail, for the convenience of his counsel in preparing appellant's defense; and the court promptly granted appellant's sweeping motion for production and private examination of all of the

tangible objects which were to be introduced by the State in evidence. When the ministers called upon the court requesting that the accused, a man previously convicted of murder in the first degree, be released from jail to go to a local church for baptism, the court acceded to the request but instructed the deputy sheriff to shoot appellant if he attempted to escape. Moreover, at the conclusion of his second trial, appellant, instead of receiving the death sentence upon conviction, was given a sentence of life imprisonment.

We have concluded that the trial court acted properly, and even generously, toward appellant in the course of the second trial and that the court exhibited no personal bias or prejudice to the jury. A jury inflamed against the accused would hardly have convicted him of murder in the first degree and then spared his life by imposing a sentence of life imprisonment.

[6, 7] It is an established rule of law that while a trial judge may have an opinion as to the merits of the case on trial, this does not make him biased or prejudiced as to the conduct of the trial. When challenged for bias and prejudice, it is for the trial court to search his consicence and decide whether to recuse himself from the case. We find from the record in this case that the trial court conducted the trial in an exemplary manner and without any bias or prejudice toward the accused.

In an early Arkansas case, Jones v. State, 61 Ark. 88, 32 S. W. 81 (1895), we said:

> "• • • If having formed an opinion as to the guilt or innocence of a defendant on trial in a criminal case was a disqualification of a judge presiding at the trial, it would be often a difficult matter to find a judge that would not be disqualified. • • •"

See also Reaves and Neal v. State, 229 Ark. 453, 316 S. W. 2d 824 (Repl. 1958); State v. Flynn, 31 Ark. 35

(1936), and 48 C. J. S., Judges, § 82 at p. 1061, from which we quote:

> "* * * A judge is not disqualified by having known defendant in a criminal trial or by having sat in trial of defendant on previous occasions. The fact that a judge is prejudiced against the commission of a crime does not disqualify him from presiding at the trial thereof. He is not necessarily disqualified because he has formed an opinion as to the legal questions involved in the case or as to the guilt or innocence of an accused who is brought before him; nor is he disqualified because of unfavorable comments or an expression of opinion as to the guilt or innocence of such accused. * * *"

The language quoted above applies only to those opinions of the court expressed out of the presence of the jury trying the case, which is the exact situation in relation to the comments of the trial court in this case.

Our trial judges are forbidden from commenting on the evidence to the jury. § 23, Article VII, Constitution of Arkansas (1874).

We therefore find no merit in appellant's contentions under Point No. 3.

Point No. 4—Prejudicial comments of the court during conduct of the trial.

[8] We have examined the record in this case as to all comments of the trial court made in the presence of the jury and we find no prejudicial error in any of said comments.

We therefore find no merit in appellant's contentions under Point No. 4.

Point No. 5—Prejudicial comments of the court to the jury prior to trial.

[9] When the jury panel was sworn to answer questions put to them as to their qualifications, the court made the following comments:

> "By way of explanation, I might say to the jury that this is the second time this case has been tried or will be the second time. Mr. Walker was tried once and convicted and the Supreme Court reversed it and sent it back here for retrial."

The court granted counsel for appellant wide latitude throughout the voir dire examination of the jurors. This examination continued for more than one day. On the second day, two additional jurors reported and for their benefit the court made the following explanatory statement:

> "I might mention, by way of explanation, that Mr. Walker was tried previously, convicted, and the Supreme Court reversed the case and sent it back for a new trial."

Counsel for appellant in the course of this trial cross-examined the prosecuting witnesses at great length upon the testimony they had given in the first trial of appellant, in an effort to impeach their testimony. Throughout the taking of evidence, the fact that appellant had been tried before on the same charge was kept before the jury by counsel for appellant. Appellant is, therefore, in no position to complain because of the explanatory statements of fact made by the court.

Furthermore, when the trial court explained to the jury panel, before the trial jury was selected from the panel, that the previous conviction of appellant had been reversed by this court, necessitating a new trial, the impli-

cations of these remarks, if any, could be construed as favorable to the accused.

In Stanley v. State, 174 Ark. 743, 297 S. W. 826 (1927), it was held that it was not error for the prosecuting attorney in his opening statement to tell the actual trial jury of a previous conviction and reversal by the Supreme Court. In Ford v. State, 222 Ark. 16, 257 S. W. 2d 30 (1953), a far longer statement by the lower court to the effect that the defendant had been tried and convicted for the same crime previously was held not to be error. See also Youngblood v. State, 161 Ark. 144, 255 S. W. 572 (1924), cited by appellant. There, it was said that the purpose of the statute, Ark. Stat. Ann., § 43-2205 (Repl. 1964), was to prevent a former conviction from being used in evidence or argument. In the present case, the fact that Walker had been tried and convicted was not offered in evidence nor was it argued.

We therefore find no merit in appellant's contentions under Point No. 5.

Point No. 6—Permitting the State to read into evidence the transcript of previous testimony of Linda Ford and Mary Louise Roberts.

[10] We agree with appellant that the testimony of Linda Ford in particular, the eyewitness to the shooting, was extremely material to the State's case. We also agree with the trial court that it was necessary to produce her and have her present at the trial if she could be located, picked up and held as a material witness.

Ark. Stat. Ann., § 28-713 (Repl. 1962) provides as follows:

> "Admissibility of testimony at prior trial.—On the trial of any cause, civil or criminal, the properly authenticated transcript of the testimony of any wit-

ness, or other evidence of the testimony of any witness when properly proved, which testimony was given in any court at any former trial or examination of the same cause between the same parties or their privies, may be read or admitted in evidence, when the former witness is dead, beyond the jurisdiction of the court, has become insane since the former trial or examination, or when for any reason the former witness may not be available, and also in all cases in which for any reason a former witness refuses to testify concerning the matters as to which he formerly testified. But no such transcript of testimony, nor proof of such testimony, may be admitted on behalf of either party in a criminal case unless it is first shown that the party against whom it is sought to be used was present, in person or by attorney, at the former trial or examination and there had the opportunity to examine or cross-examine the witness whose testimony is offered in evidence. [Init. Meas. 1936, No. 3, § 14; Acts 1937, § 14, p. 1384; Pope's Dig., § 3916.]"

Chief of Police Ray Vick of the North Little Rock Police Department, and Chief of Police R. E. Brians of the Little Rock Police Department, testified that several weeks before appellant's trial they had issued general pickup instructions as to these witnesses, including their names, clubs frequented, etc.

Deputy Sheriff Dennis L. Jones testified concerning his sustained effort to find the witnesses in advance of the trial.

We quote from appellant's abstract of the testimony of Deputy Sheriff Jones:

"I am a deputy sheriff. I attempted to locate Linda Ford in reference to a subpoena. I called the police chief at Lake Village. I was later informed she was

living at 1800 Scott St., Little Rock. I attempted to find her mother, who formerly lived with her at 1102½ Main St., Little Rock, and was advised she no longer lived there. I learned today where her mother is supposed to be living and went there and found no one at home in this big rooming house. I rang the bell and looked in the windows but was able to raise no one. I asked for the assistance of the North Little Rock Police Department and the Little Rock Police Department. The last time Mary Roberts was seen in North Little Rock was some two or three weeks before the subpoena was issued. She was on the Wonder Grill lot in North Little Rock. Further information indicated she visited Barbara somebody who lives at 402 E. 12th St., North Little Rock. I made repeated trips by the Wonder Grill and by 402 E. 12th St. attempting to locate her automobile with negative results. Mary Roberts previously gave the address of 2209 McAlmont, which was her sister, Hazel Powell's address. Investigation revealed that Hazel Powell did not live at that address any longer."

It will be recalled that at the very beginning of the trial, all witnesses were required to come forward to be sworn. Linda Ford and Mary Louise Roberts did not appear to be sworn. There was, therefrom, no element of surprise to appellant when the State sought during the progress of the trial to offer their testimony as given at the previous trial. We have concluded that an adequate foundation was laid for the introduction of this previous testimony, and that the trial court did not abuse its discretion in permitting same to be received and to go to the jury.

At the first trial, Linda Ford testified in person and appellant was convicted and received the death sentence. It is generally recognized that the reading of previous

testimony of a witness not present in the courtroom is not as effective as having the witness on the stand. It may well be that the inability of the State to produce these witnesses for the second trial had a part in the ultimate lesser sentence of appellant to life imprisonment. Cases of interest on this point include the following:

Mode v. State, 234 Ark. 46, 350 S. W. 2d 675 (1961); Smith v. State, 222 Ark. 585, 261 S. W. 2d 788 (1953); Marks v. State, 192 Ark. 881, 95 S. W. 2d 634 (1936); Adams v. State, 176 Ark. 916, 5 S. W. 2d 946 (1928), and Edwards v. State, 171 Ark. 778, 286 S. W. 935 (1926).

We therefore find no merit in appellant's contentions under Point No. 6.

Point No. 7—Denying defendant's motion to quash the regular, alternate and special jury panels.

[11] Appellant contends that the petit and grand jury panels should have been quashed because they were not selected from a list of qualified electors as required by Ark. Stat. Ann., § 39-208 (Repl. 1962).

Prior to January 1, 1965, a citizen of Arkansas had to possess a current poll tax receipt in order to be a qualified elector. Amendment 51 of the Arkansas Constitution was adopted at the general election of November 3, 1964, and superseded this requirement. It provided a new and permanent system of voter registration in order for a citizen to become a qualified elector. After Amendment 51 became effective the legislature recognizing the interim period of uncertainty as to the qualified electors pending the accomplishment of sufficient registration of voters to comprise lists of same from which adequate jury panels could be selected, passed *Act 126 of 1965* to meet the situation, and we quote the preamble and portions of said act:

"Whereas, it now appears unlikely that the qualified individuals in Arkansas may be registered under

Amendment 51 prior to March 1, 1965, and there will be an interim time from March 1, 1965, until later in the year when voter registration is an accomplished fact.

"Section I—All other persons who otherwise possess the qualifications of a grand or petit juror as now provided by the statutes of Arkansas and who have paid a poll tax between October 1, 1963, and October 1, 1965, are hereby declared to be an eligible grand or petit juror.

"Section II—This Act shall be in full force and effect from March 1, 1965, to October 1, 1965."

The record reflects that the jury panels in this case were selected nearly two months before November 3, 1965, when the hearing on the motion to quash was heard. This necessarily made Act 126 of 1965 squarely applicable to the situation at hand. See Coger v. City of Fayetteville, 239 Ark. 688, 393 S. W. 2d 622 (1965); Harris v. State, 239 Ark. 771, 394 S. W. 2d 135 (1965), and also Tiner v. State, 239 Ark. 819, 394 S. W. 2d 608 (1965).

We therefore find no error in the denial of appellant's motion to quash the jury panels. We also find no abuse of discretion by the trial court in refusing to disqualify the jury commissioners, or as to any other alleged irregularity in the selection of the trial jury.

We therefore find no merit in appellant's contentions under Point No. 7.

Point No. 8—Refusal of the court to admit defendant's hospital records into evidence.

[12-14] Appellant contends that it was error for the court to withdraw appellant's hospital record after it had been properly admitted in accordance with Ark. Stat. Ann., § 28-928, and Ark. Stat. Ann., § 28-932 (Repl. 1962).

We agree with appellant in that the hospital record was properly admitted and should have been permitted to be read to the jury by the Chief Medical Records Librarian. The librarian as custodian of the medical records could not properly testify as to her opinion or interpretation of records which she held as custodian but did not personally make. The purpose of Ark. Stat. Ann. § 28-928 is to overcome the old rule that such written reports are hearsay and therefore such records are admissible if properly established as being made in the regular course of the hospital's business procedures. However, during the trial, Dr. Robert M. Stainton, the doctor who had prepared the hospital report in question, was called as a witness and at that time it was admitted into evidence and read into the record by Dr. Stainton. Any error was thus completely cured.

We therefore find no merit in appellant's contentions under Point No. 8.

Point No. 9—Denial of defendant's petition for a change of venue.

Ark. Stat. Ann. § 43-1501 (Repl. 1964) states:

> "Prejudice. Any criminal cause pending in any circuit court may be removed by the order of such court, or by the judge thereof in vacation, to the circuit court of another county, whenever it shall appear, in the manner hereinafter provided, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair and impartial trial cannot be had therein. [Crim. Code, § 414, as added by Act Apr. 25, 1873, No. 98, § 1, p. 234; C. & M. Dig., § 3087; Pope's Dig., § 3917.]"

[15] The rule as to a change of venue has been frequently examined and is well established. As stated in

Perry v. State, 232 Ark. 959, 342 S. W. 2d 95 (1960), the trial court has wide discretion in passing upon a petition for change of venue and unless it appears that the court has abused that discretion, this court will not reverse. See also Lauderdale v. State, 233 Ark. 96, 343 S. W. 2d 422 (1961).

[16] The newspaper articles that gave wide publicity to appellant's case were published either before or just after appellant's first trial in 1963, almost two years before the instant trial was held, with the exception of one editorial in the Arkansas Gazette published on May 12, 1965. We have concluded that the impact of the editorial coincided with the general distribution of the Gazette, which is statewide. While we do not approve of some of the inflammatory language in this editorial, we believe its adverse effect, if any, as to appellant had been dissipated at the time of trial.

Furthermore, appellant's counsel, during voir dire, thoroughly examined the jurors on this subject and all jurors who were accepted stated that they could give appellant a fair hearing and verdict, free of any influence by the editorial.

It appears, therefore, that there was ample support in the record for the decision of the trial court to deny the motion for a change of venue. We find no abuse of discretion by the trial court as to this issue.

We therefore find no merit in appellant's contentions under Point No. 9.

Point No. 10—Contentions as to error in instructions given or refused by the court.

[17, 18] We have examined all of the instructions given by the court to the jury. We find no error in the instruc-

tions. We have likewise examined the instructions requested by appellant which the court declined to give. All of such instructions were either fully covered by other instructions actually given or refused as erroneous under law.

We therefore find no merit in appellant's contentions under Point No. 10.

Point No. 11—Refusal of the court to instruct the jury on manslaughter.

[19] The court refused to grant appellant's request for an instruction on manslaughter, and this ruling is assigned as error. The same circumstances were presented to this court in Outler v. State, 154 Ark. 598, 243 S. W. 851 (1922), where it was said: "At any rate, the verdict of the jury under this instruction (of first degree and second degree murder) necessarily implied a finding that the killing was not done under circumstances which would reduce the degree of the offense to manslaughter, and no prejudice resulted from the failure of the court to instruct on the subject of manslaughter." See Newsome v. State, 214 Ark. 48, 214 S. W. 2d 778 (1948), and also Talley v. State, 236 Ark. 908, 911, 370 S. W. 2d 604 (1963), where again the refusal to instruct on manslaughter was considered harmless error in view of the fact that the appellant was found guilty of first or second degree murder.

We therefore find no merit in appellant's contentions under Point No. 11.

Point No. 12—Refusal of the court to reduce the charge against appellant from first degree murder to second degree murder.

At the conclusion of the State's case, the appellant moved for a reduction of the charge from first degree

murder to second degree murder and also later requested a similar instruction to the jury, both of which were refused by the court.

As discussed under Point No. 11, the instructions as given to the jury authorized the jury to bring in a verdict of second degree murder or a verdict of murder in the first degree.

Linda Ford, a passenger in the car of appellant, testified that appellant fired first at Officer Vaughn. The cab driver on the scene testified that he heard shots being fired before observing Officer Vaughn draw his pistol. Appellant must have known from the flashing dome light of the Barrentine police car that his car was being stopped for a police check.

[20] Appellant had no known reason to fear for his personal safety when his car was caused to slow down and pull over and stop by the police car behind it. Appellant opened the car door with a drawn gun in his hand and started the shooting with deadly accuracy. There is no suggestion in this record that he did not act of his own volition and with deliberation. The evidence in the case was certainly sufficient to authorize the jury in finding that appellant killed Officer Vaughn with deliberation, premeditation and malice aforethought.

[21, 22] The necessary elements of deliberation and premeditation in the offense of murder in the first degree may be inferred from the factual circumstances as shown by the evidence, where those circumstances clearly warrant the jury in such an inference or conclusion. In this case, the circumstances as reflected by the evidence are inconsistent with any other hypothesis than that of murder in the first degree, House v. State, 230 Ark. 622, 324 S. W. 2d 112 (1959), and Weldon v. State, 168 Ark. 534, 270 S. W. 968 (1925).

We therefore find no merit in appellant's contentions under Point No. 12.

Having found no merit in any of the points urged by appellant, the judgment of the trial court is affirmed.

Affirmed.

On Petition for Rehearing.

Per Curiam.

Petition for rehearing is denied; Justices George Rose Smith and Amsler would grant the rehearing. Permission is granted to appellant to file a petition in the trial court under Criminal Procedure Rule No. 1 for a hearing on the question only of suppression of the evidence of Mary Louise Roberts and Linda Ford, and the trial court shall conduct such hearing, allowing full presentation of evidence from the appellant and State, on this question; the hearing and all proceedings thereafter shall be conducted in accordance with Criminal Procedure Rule No. 1.

McFaddin and Bland, JJ., dissent as to permitting appellant to proceed under Criminal Procedure Rule No. 1.

SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1014

JAMES DEAN WALKER,
APPELLANT,

v.

STATE OF ARKANSAS,
APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT.

JOE PURCELL,
Attorney General
Attorney for Appellee

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IN THE

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STATE OF ARKANSAS,
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ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

JURISDICTIONAL STATEMENT.

BRIEF

Before getting into the formal argument of the points presented in this case the State will make two observations concerning jurisdiction which will be prevalent in its discussion of appellant's separate points. These are:

1. This appeal does not present a substantial federal question, therefore, the appeal should be dismissed or the judgment affirmed.

2. Writ of Certiorari should be denied by this Court in its discretion because the points raised by appellant are not of sufficient importance for review.

With this preliminary statement in mind, we now turn to a discussion of the separate points presented by appellant.

I

Appellant asserts that *Ark. Stat. Ann.* §43-2010 is unconstitutional because it violates the constitutional provisions against self incrimination.

Statutes of this nature have been discussed by very few court decisions. The cases that appellee has found are annotated in 96 A.L.R. 2d 1224 under the title of "The Prosecution — Right To Discovery".

The annotation discusses cases which consider the federal procedure and cases from state courts considering the problem. The better reasoned cases hold that the prosecution has a right to discover an accused defendant's documents and it is not a violation of the constitutional right against self incrimination.

See: *United States* v. *Eli Lilly & Co.*, 24 F.R.D. 285 (1959, N.J.); *United States* v. *Woodner*, 28 F.R.D. 22 (1961, N.Y.); *Jones* v *Superior Court of Nevada County*, 58 Cal. 2d 56, 372 P. 2d 919; and *State* v. *Grove*, 398 P. 2d 170 (Wash.).

These cases are in accord with the holding of the Arkansas Supreme Court and there is no major conflict concerning these discovery statutes.

For the above reason this point does not present a substantial federal question. We also list other reasons why, under the particular facts of this case, this point does not present a question for review by this court.

1. Appellant admits that the discovery ballistics report was inconclusive. We submit that it was inconclusive and was not incriminating.

2. The ballistics report was not introduced in evidence in the trial so it did not incriminate anyone. It appears to us that it could only have been introduced by appellant's witness or as impeachment of appellant if he testified in his own behalf.

3. Appellant received the benefit of the statute when he discovered the prosecution's file. He should not now be allowed to complain that the prosecution also used it against him. There should be some mutuality.

4. The statute in this case and in future cases was and will be much more beneficial to an accused than it will be to the prosecution.

5. The Supreme Court of Arkansas thoroughly considered this point raised by appellant in its opinion and its per curiam order denying appellant's petition for rehearing and found it to be without merit.

We submit that this point is not substantial and is without merit.

II

This point concerning the misconduct of the trial judge does not raise a substantial federal question and

is not meritorious. This point was raised in the Arkansas Supreme Court and was fully considered by it in its opinion and its order denying appellant's petition for rehearing.

The laws of Arkansas adequately protect a criminal defendant and insure that he gets a fair and impartial trial and that he is accorded due process of law.

The Supreme Court of Arkansas has considered this problem many times. Our court will see to it that an accused defendant receives a fair trial. If an accused does not receive a fair trial, our court will reverse the case for a new trial and protect a defendant's rights.

It would be time and space consuming for us to state the reasons why we feel appellant was not deprived of due process of law. Suffice it to say, the reasoning given in the opinion by the Arkansas Supreme Court clearly shows that appellant was not deprived of any of his constitutional rights. (See pages 48-51 of Appellant's brief.)

We are sure that there are many cases which come to this court each year with this problem of misconduct of a trial judge involved. Appellant was adequately protected by our court and this point is not important enough to review.

III

All of the cases cited by appellant in his brief are not applicable to the facts in this particular case. The cases cited by appellant pertaining to evidence of convictions of other unrelated crimes. This was merely a

statement by the trial court of the disposition of the case on the first trial.

The Arkansas Supreme Court has considered this point many times before and its reasoning finding this point without merit is sound. This reasoning is set out on pages 52 and 53 of appellant's brief.

This point does not raise a substantial question for review.

IV

The cases of *Sheppard* v. *Maxwell* 86 Sup. Ct. 1507 and *Irvin* v. *Dowd,* 366 U.S. 717 do not apply here. The fact situations in those cases are in many ways different than the case at bar.

In those cases, the newspaper articles and publicity started at the very beginning of the commission of the crime and continued until the conviction. To outline the amount of publicity given to those trials would unduly lengthen this brief.

We agree with the holdings in those line of cases cited by appellant dealing with publicity which deny an accused a fair trial. But, those holdings do not apply here.

Perhaps, if appellant were complaining about the newspaper influence on the verdict of the jury in the first trial he would have a case. But, the point was not even raised in the first appeal to the Supreme Court of Arkansas. *Walker* v. *State,* 239 Ark. 172, 388 S.W. 2d 13.

We submit that the influence of the newspaper articles in 1963 (if they had any) was no longer a factor during the retrial of this case which was long after the case had been reversed and remanded by the Arkansas Supreme Court for a new trial.

Further, one newspaper editorial will not make a federal case out of a murder trial. This case falls far short of *Sheppard* and *Irvin*. There is no federal question here.

V

The Supreme Court of Arkansas upheld the trial court's ruling allowing the testimony of the two witnesses at the prior trial to be read to the jury and concluded that a proper foundation was laid.

We submit that the provisions of *Ark. Stat. Ann.* §28-713 were followed to the letter by the prosecution in reading the testimony to the jury. We contend that if there is compliance with the statute in admitting testimony at a prior trial in the present trial an accused is not denied any of his constitutional rights. The record simply will not bear out appellant's contention on page 33 of his brief. A proper foundation was laid.

It should be noted that on rehearing the Arkansas Supreme Court granted appellant leave to test this question in the trial court under Criminal Procedure Rule No. 1 of the Supreme Court of Arkansas. See page 62 of appellant's brief. But, appellant has elected to appeal to this court.

This point does not present a federal question.

VI

The State is hard pressed to see how appellant can complain that evidence was suppressed. As the Supreme Court of Arkansas noted he was allowed to inspect and copy all of the prosecution's tangible evidence.

Actually, what appellant is doing here, is making a jury argument to this court and attempting to point out discrepancies in the State's case. We admit the perfect case was not presented, but there is sufficient evidence to sustain a conviction of appellant.

The record does not support appellant's position and a jury argument to this court will not raise a federal question.

CONCLUSION

All of these questions were presented to the Supreme Court of Arkansas. They were fully considered and found to be without merit in the opinion and the order denying a rehearing.

We submit that the appeal should be dismissed or the judgment affirmed as there is no substantial federal question involved. Further, writ of certiorari should be denied by the court in its discretion.

Respectfully submitted,

JOE PURCELL

Attorney General

Attorney for Appellee

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SUPREME COURT, U. S.

No. 1014.

MAY 5 1959

IN THE

SUPREME COURT OF THE UNITED STATES.

JAMES DEAN WALKER,
Appellant,

v.

STATE OF ARKANSAS,
Appellee.

On Appeal From the Supreme Court of Arkansas.

PETITION FOR REHEARING.

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CITATIONS.

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IN THE

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JAMES DEAN WALKER,
Appellant,

v.

STATE OF ARKANSAS,
Appellee.

On Appeal From the Supreme Court of Arkansas.

PETITION FOR REHEARING.

Petitioner respectfully prays that this Court grant rehearing of its order of April 17, 1967, granting the motion to dismiss the appeal and dismissing the appeal, and also treating the papers whereon the appeal was taken as a petition for a writ of certiorari, denying certiorari. Petitioner prays that his appeal be allowed or that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas.

REASONS FOR GRANTING REHEARING.

Petitioner realizes that it is impossible for the Supreme Court of the United States to review every criminal conviction, even where serious and all too often flagrant breaches of civil rights and liberties have occurred. The scope of this case, however, by the nature of its very ingredients and the wide publicity given it, has become perhaps the most important criminal decision ever appealed from the Arkansas courts. This decision by the Arkansas Supreme Court has become a landmark decision in this state, already threatening to bring about far-reaching innovations in criminal practice. If the Supreme Court of the United States does not review this case, this petitioner, who has been unjustly and unfairly convicted of a crime which in all probability was never committed, is in a position of being required to spend the rest of his natural life in the penitentiary of the State of Arkansas. The floodgate has been opened to similar injustice for hundreds of other criminally accused in this state, who, under the purview of this decision, will be and are being required to submit themselves to the following "Star Chamber" practices approved by the Arkansas Supreme Court in this decision:

1. This decision has upheld the validity of a pretrial criminal discovery act (Ark. Stat. Ann. 43-2010) which gives to the prosecution the unfettered right of pretrial discovery in criminal cases against an accused; and the right of the prosecuting attorney to pilfer and plunder defense counsel files to ferret out incriminating matter and require its production by the accused for use in evidence against him at his trial.

2. This decision winks at the conduct of police officials in suppressing evidence by running off material witnesses, sawing off gun barrels to interfere with defense ballistics

examinations, hiding and concealing from evidence photographs, ballistics reports, fingerprint tests and paraffin tests, favorable or potentially favorable to the accused, and the uncomplimentary behavior in testifying falsely and deceptively to certain essential matters, withholding vital evidence favorable to the accused.

3. However, an accused on the other hand must cooperate with the prosecution, the opinion holds, and cannot suppress evidence in his possession or in the possession of his attorney even though it is incriminating in nature, and must deliver it over to the prosecution and allow the State to pilfer defense files and confiscate any incriminating matter found therein.

4. The opinion holds that a trial judge who has publicly avowed in advance of the accused's trial to "burn the s. o. b. if I can" is a fair and impartial judge—a fact emphasized by the trial judge's attitude in deciding "to baptize the defendant" before he burned him.

5. It is not prejudicial, the opinion holds, for the State's largest daily newspaper to print editorials urging potential jurors at the accused's forthcoming trial to give the accused the death penalty and to settle for nothing less.

If this decision by the Arkansas Supreme Court is allowed to stand, the very concept of a fair trial has been materially altered and the meaning of the term "due process" diluted. The Attorney General of Arkansas strenuously argued in his Motion to Dismiss and Affirm (pp. 2-3) that criminal discovery statutes, such as Ark. Stat. Ann.,§ 43-2010, advanced the cause of criminal justice and that the "prosecution has a right to discover an accused defendant's documents" over the claim of self-incrimination. This case is of far reaching importance, therefore, inasmuch as there needs to be limits set and guidelines established in this important field of criminal discovery. Throughout history the Supreme Court of the United

States has stood as a bulwark, jealously guarding the civil rights and liberties of all citizens regardless of their station in life against any unconstitutional encroachment or inroads. The affirmance of this decision would be a step backwards in criminal jurisprudence. The constitutional prohibition against compulsory self-incrimination would thereby be contaminated and rendered meaningless. The states cannot be permitted to do, under color of a "discovery statute", that which the Constitution prohibits. If this court does not review petitioner's conviction and grant him relief, the State of Arkansas will have convicted him under the following circumstances:

(A) **Trial Judge.**

The trial judge who presided over the trial permitted his personal feelings to become so embroiled that he, in effect, assumed the role of the prosecutor—the chief advocate. He made no effort to conceal his feelings of prejudice from the jury, but in fact exercised every opportunity to manifest his hostility and prejudice towards the accused in the presence of the jury. That the days of the "hanging judge" are not over can be seen in the following instance which appeared in the record.

Defendant moved that the trial judge disqualify himself because of personal feelings about the case and because he had on prior occasions made highly prejudicial statements showing hostility toward defendant (T. 80). Upon this motion the petitioner offered the testimony of Rev. Ray Branscum and two other witnesses (T. 83-92), who testified that the trial judge had made statements in their presence that "he intended to burn the S. O. B." (referring to the accused) "if he could". To this the judge replied:

> "* * * It is not up to me to burn him or punish him. If it was, we wouldn't have to have this trial" (T. 85-86).

The judge, after hearing this testimony, overruled defendant's motion for disqualification and stated, ". . . I think I can give him a fair trial, the Supreme Court can reverse me. They have reversed me once before when I thought I was right. I don't think my personal feelings have anything to do with it one way or the other" (T. 93).

The trial judge's treatment of defendant's counsel was one of disrespect, a means of conveying to the jury how he felt about the case. The constant ridiculing, belittling, and interruptions can be read between the lines of many pages of the trial transcript. In some places you don't even have to read between the lines. For instance:

> "Mr. Worsham: Also, if the court please, I wish to complain about the tone of the court's voice when he addresses counsel before the jury.
>
> The Court: I can't control that, I'm sorry.
>
> Mr. Worsham: And the demeanor of the court toward counsel for the defense in the presence of the jury. It is very prejudicial and when coupled with the comments and various inflections he places on his words, it places counsel in a very awkward position" (T. 294).

Instances of the judge's comments are grouped together in the appellant's brief before the Supreme Court of Arkansas, which is attached to the record. They are found at pages 143 to 160 of that brief.

The record reflects many dozens of improvident comments by the trial jurist and many instances of his verbal abuse of defense counsel, both within and without the presence of the jury. The record is filled with his constant belittlement of defense counsel (T. 290-292; 300; 392; 417; 829; 1167; 293-294), suggesting that "they were asking ridiculous questions" (T. 300, 417, 636, 780, 842), "making ridiculous objections" (T. 636); "stalling around trying

to kill time so that defendants could get their witnesses here" (T. 570, 572); "costing the state unnecessary money" (T. 428, 829, 851); suggesting in the presence of the jury that defense's expert had tampered with the ballistics evidence (T. 776-777); asking defense counsel "is there anything else that (he) can think of that the prosecutor has lied about" (T. 882); expressing undue and unnecessary impatience with defense counsel in making objections, and in denying at least a thirty-minute recess (T. 570-572, 636); and expressing surprise and ridicule to the jury at defense counsel's offer to waive the oath when calling the prosecuting attorney as a witness, and twice telling the jury that defendant had previously been found guilty and convicted of first degree murder by the previous jury for this same offense (T. 148; 334), suggesting that their task on the "retrial" was but a mere formality to carry out a technicality.

The conduct of the trial judge was argued before the Supreme Court of Arkansas and fell on deaf ears. In the petition for rehearing before the State Supreme Court, we said, "The record in this case would probably shock the United States Supreme Court, it should have shocked the Arkansas Supreme Court." We suspect that the Supreme Court of Arkansas is surprised that the Supreme Court of the United States was not shocked, and refused to review the case.

(B) **The Newspapers.**

The petitioner was accused of killing a policeman; this is the exceptional type of case where the forces of the State, the public, and the press, were clamoring for blood. There was, as a practical matter, no way for petitioner to get a fair trial in Pulaski County, Arkansas. This can readily be seen by the pretrial publicity, petitioner being the **cause celebre** of Little Rock, Arkansas which through the years has suffered a dearth of sensational crime.

It was so bad that the editorial page of a very liberal newspaper, the **Arkansas Gazette**, got into the act, but unlike most liberal newspapers, adopted the position of a prosecutor. Note this editorial (T. 18-19):

> "James Dean Walker now has a new lawyer and is awaiting a new trial.
>
> The trial was ordered by the state Supreme Court because of a procedural error in its predecessor—in which the jury convicted Walker of first-degree murder in the killing of a North Little Rock policeman and sentenced him to die in the electric chair. The North Little Rock Times reports that Walker's defense this time around is being financed by a group of Christian laymen opposed to the death penalty.
>
> • • •
>
> We do think killing a policeman an especially repugnant crime for which especially harsh penalties are in order. An attack on an officer of the law is an attack on the law itself, and is therefore an attack on the whole fabric of social order.
>
> The point which seems to us worth making is that the way the Arkansas remission and probation system now is operated it is impossible to put away any sort of a felon—cop killers and mutilators of little children included—with any assurance that confinement will last longer than eight years. No matter how heinous the offense, there is an excellent chance that the governor will reduce the sentence and that the Parole Board the governor appoints will then release the offender.
>
> This is, it seems to us, an almost insuperable barrier to abolition of the death penalty, or even to sensible consideration of abolition of the death penalty. It is, surely, one reason Arkansas juries do not incline to avoid the death penalty. They know that they must choose between putting a criminal out of circula-

> tion permanently—by taking his life—and putting him out of circulation for eight years or so, by decreeing a life sentence. One needn't favor taking of a life for a life to incline toward the death penalty for especially dangerous criminals under those ground rules."

Sixteen other inflammatory articles are in the record in this case (T. 859-861).

The fact that a Pulaski County jury would find petitioner guilty was a foregone conclusion; defense counsel knew they were battling against hope; the only miracle in the whole case is the fact that the jury did not choose the death penalty called for by the newspapers.

(C) **Prosecuting Attorney.**

The Prosecuting Attorney wanted the private ballistic report prepared by petitioner's expert witness, so pursuant to the Arkansas Criminal Discovery Statute—Ark. Stat. Ann., § 43-2010—he moved the trial court to order the defense counsel to produce said report from their defense files. The defense objected strongly to this, but the trial judge ordered the defense to produce this report. The findings in the ballistic report were inconclusive, but contained matters incriminating to the petitioner, e. g., it was found that the class characteristics between the alleged murder weapon and the fatal bullet were identical (T. 48). Contrary to the law, the Prosecuting Attorney was allowed to delve into the defense counsel's files.

(D) **The Police.**

The petitioner was accused of killing a policeman, and the police in preparing the case did an excellent job for the Prosecuting Attorney—a little too excellent for those of us who prefer due process in criminal matters. This conduct of the police is understandable, a brother police

officer was killed seemingly by petitioner, but their suppression of evidence cannot be excused.

There was much gunplay at the scene, and the defense theory was that Officer Barrentine, a fellow officer of the decedent, had accidentally shot the deceased officer, Officer Vaughan, or that he was struck by a ricochet bullet from the Barrentine gun. Officer Barrentine testified at the time of the incident his gun had a four-inch barrel. However, when it came time for a ballistics test by the defense expert, it was found that Officer Barrentine's gun had had two inches cut off the barrel, making it impossible for the defense to perform a ballistic test to determine whether or not it was the lethal weapon (T. 667). Also, on cross-examination of Officer Barrentine (T. 667-668) it was developed that he had at the first trial of petitioner falsely testified concerning his shooting the petitioner five times after his partner was killed—when in truth and in fact the decedent, Officer Vaughan, had fired five bullets into petitioner's body before he was killed. Officer Vaughan, the deceased, was shot only once, and directly in the heart, and died instantly. Therefore, the deceased shot and wounded the petitioner five times before the fatal shot was ever fired.

At the second trial defense counsel tried to pierce the fog and show that Officer Vaughan had fired first and emptied five shots into petitioner, rendering him unconscious, and that Officer Barrentine had not only sawed off his gun barrel to prevent a defense ballistic test but gave knowingly false and deceptive testimony at the first trial.

Another good indication of what the police have done is seen in regard to the testimony of Mary Louise Roberts and Linda Ford, who were at the scene of the shooting. They were called as witnesses by the prosecution at the first trial, and their testimony was extremely favorable

to the prosecution. They were, in fact, the only witnesses who claimed to have seen the petitioner fire at the deceased. At the second trial, the prosecution claimed they were unavailable, so the trial judge, over the defense objections, allowed the prosecuting attorney to read an unauthenticated transcript of their purported testimony at the first trial. After the trial, and too late for use therein, defense counsel managed to find Mary Louise Roberts. Her sworn statement given before a court reporter is in the record as an exhibit to the petition for rehearing before the Supreme Court of Arkansas, and is a part of this record on appeal.

The witness, Mary Roberts, relates at pages 4, 5 and 6 of her statement the manner in which she became "unavailable" for the second trial. The deputy sheriff came to her home approximately one week before the trial and advised her that he had a subpoena for her and would be back later that evening to serve the subpoena. Prior to this a North Little Rock police officer had advised her that they were getting ready to retry the accused and asked her if she wanted to be here for the trial (p. 6). This officer, whom she had been dating, had agreed earlier to tip her off when the trial date arrived so she could leave town (p. 7). The witness describes at pages 7-12 of her statement that she had previously informed certain North Little Rock police officers that if called as a witness again her testimony would be unfavorable to the prosecution. She did not immediately leave and a detective on the North Little Rock Police Department came across the river to Little Rock to her room at the Rose Motel and "advised" her to leave town. She was slow in leaving, and the officer came a second time to the motel and through menacement of jailing induced her to leave town—she was first arrested, then released to leave town. At pages 18-26 the witness gives a full account of the events occurring at the scene of the alleged killing sub-

stantially in accord with what purports to be her former testimony, excepting the fact she, like the absentminded Officer Barrentine, added certain facts previously omitted and suppressed from her purported testimony at the former trial. This witness stated (p. 21) that deceased Officer Vaughan opened the front door of the Oldsmobile. She didn't hear the conversation, but Walker bent over and started to reach under the seat. The witness stated (pp. 22-24) that Officer Vaughan had his gun in his hand when he opened the door and when Walker bent over Officer Vaughan pulled the trigger and started firing. She never did see Walker with a gun in his hand, or see him fire a shot (pp. 22, 23). Five or six shots were fired before Officer Vaughan was shot (p. 24). He screamed when he was shot. At page 23 of her statement the witness says that as soon as Walker was shot he slumped over in the seat. She never did see him raise a gun to fire at Officer Vaughan, nor see him fire a shot. Walker slumped when the first shot was fired. Officer Vaughan fired first (p. 24). The witness states definitely and with certainty, page 26 of her statement, that the appellant Walker, who was found unconscious holding a fully-loaded gun, never fired a shot. The witness states at page 28 of her statement that she does not know how the empty gun found at the scene got under Walker, but she observed a police officer standing over the unconscious defendant emptying shells out of a gun into the palm of his hand and replacing shells back in it. At the time of the last trial Linda Ford was staying in the Pine Bluff Motel at Pine Bluff, Arkansas.

This statement by the witness Mary Louise Roberts describes a course of conduct by the prosecution and agencies of government substantially the same caliber as pursued all the way through. From the beginning this has been a case of missing gun barrels, missing witnesses, missing ballistics reports, missing photographs, missing

fingerprints and paraffin tests, missing shell hulls, and amnesia-stricken witnesses.

As we have said before we can understand the feelings of the police in the matter of the killing of a fellow officer, and in fact would be surprised if the police had conducted themselves in any other manner, but still this does not make for due process in criminal matters. Petitioner was found unconscious at the scene with five bullets in him (T. 683-871). It would have been much easier for the police to have finished the job there, rather than wait until his trial and try to finish him nunc pro tunc.

The conduct of the police in suppressing evidence is understandable, but not excusable.

THE QUESTIONS PRESENTED WERE SUBSTANTIAL.

(A) Discovery in Criminal Cases.

In this day of the developing police state, e. g., wiretaps, the microphones in the martini olives, truth drugs, etc., it would be beneficial to society to know how far the Criminal Discovery Statutes such as Ark. Stat. Ann. § 43-2010 apply, i. e., how far may the State delve into the defense counsel's files and work product. That is what was done in the present case, the defense counsel being compelled by court order to turn over ballistic reports on the alleged murder weapon prepared by the defense ballistics expert, despite protests of self-incrimination.

With the promulgation of the Federal Rules of Civil Procedure in regard to discovery and their adoption by states like Arkansas, there has come to be an increased interest in and use of discovery in civil actions, and this has caused a similar interest in the use of discovery in criminal matters. The Federal Rules of Criminal Proce-

dure has discovery provisions as do the statutes of Arkansas and other states. Criminal discovery is taking on new importance in modern law.

The Supreme Court of the United States, although setting down guide lines in civil discovery, **Hickman v. Taylor**, 329 U. S. 495, has neglected guide lines in the more important field of criminal discovery.

There needs to be limits set and guide lines established on the use of discovery in criminal cases, as was done in the area of confession in **Miranda**. See also **Ross v. Sirica**, .., F. 2d ... (D. C. Cir., No. 20535, Jan. 23, 1967) advance copy of meritorious opinion dealing with currently volatile subject of Pretrial Discovery in Criminal Cases.

Petitioner raises a question of substantial importance, which could benefit society in that it would know how far a prosecution could go into the defense's case and files and dig out the papers and exhibits it wants, and when does a plea of self-incrimination and of attorney-client confidences close these files?

At first blush it does not seem as spectacular a question as wiretaps and confessions, but it is just as important, and unless some limits are set, petitioner and others will find themselves in prison because the question of criminal discovery procedures did not arouse the interest of the Court.

(B) **Prejudice of Trial Judge.**

Although there does not need to be a pronouncement by the Supreme Court of the United States that prejudice of a trial judge does not make for due process in criminal trials, petitioner should not have to spend time in prison as the result of a trial by a prejudicial trial judge, but rather the Supreme Court should take the case and pronounce that such a trial will not be tolerated and that

the days of the "hanging judges" went out with the taming of the Wild West.

Petitioner deserved a trial by a jury of twelve; he did not want a thirteenth member, the trial judge, on the jury. The thirteenth rendered his case unlucky.

It does not make sense for the United States Supreme Court to decline to take this case, and thus compel us to futilely pursue post-conviction remedies in the court of this hostile trial judge.

(C) **Comment on Result of Former Trial.**

The trial judge, not once but twice, informed the jury that there had been a previous trial, a conviction, and a reversal (T. 147-149, 331-335). The defense strongly objected to this.

It is doubtful that this had any effect on the jury, for with the tremendous newspaper coverage surrounding this case, anyone in Pulaski County, Arkansas, would have known this. However, it does show the attempts by the trial judge to nail the lid down on petitioner's coffin; evidently he missed the nail with the first comment, so he made the second.

There needs to be a pronouncement by the Supreme Court on how far a trial judge may go in using the results of a former trial to clobber a criminal defendant.

(D) **Pretrial Publicity.**

Although the Court in **Sheppard v. Maxwell**, 86 S. Ct. 1507, and **Irwin v. Dowd**, 81 S. Ct. 1639, has covered the law on pretrial publicity, some states such as Arkansas have not gotten the message. The editorial of the **Arkansas Gazette**, quoted *supra*, surpasses anything in those two cases. Petitioner asks that the Court take his case,

so states such as Arkansas will understand that the Court meant what it said in **Sheppard v. Maxwell** and **Irwin v. Dowd.**

(E) **Suppression of Evidence.**

That suppression of evidence violates due process is so obvious as to not need a pronouncement by the Supreme Court of the United States. It might be helpful for the police to know that this rule applies in ever criminal case including the killing of a policeman.

Suppression of evidence by the police cannot and will not be ended no matter how many cases the Supreme Court of the United States reverses on that point. However, each reversal and each time the hands of the police are slapped will make the police think twice before they slip something under the rug or advise a material witness that the weather is better elsewhere.

CONCLUSION.

Petitioner asks that you review his conviction either by appeal or by writ of certiorari, and not relegate him to a futile and lengthy pursuit of post-conviction remedies. Under Crimial Procedure Rule No. 1 of the Arkansas Supreme Court, petitioner must ask for a hearing before the same trial judge, and then appeal to the Supreme Court of Arkansas. Petitioner will then have to come to the Supreme Court of the United States again in a new proceeding before he can file for habeas corpus in Federal District Court. In the meantime petitioner would be required to spend perhaps years in the Arkansas State Penitentiary while trying to right the wrongs committed during the course of this trial. The accused is a pauper and, as the record shows, his attorneys are not only serving without fee, but during the last trial and these ensuing appeals are having to personally bear all

trial expenses, transcript costs, all brief printing costs, and other expenses. Regardless of how deserving the cause, counsel cannot continue endlessly in their service to an indigent client.

Petitioner asks for justice now, and that this honorable Court please grant him shelter to escape a biased tribunal, and grant to him the relief to which he is entitled.

Respectfully submitted,

GENE WORSHAM,

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211 Spring Street,
Little Rock, Arkansas,
Attorneys for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Fletcher Jackson.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

WALKER *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 1014. Decided April 17, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.